No. 482

FILED
DEC 13 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

JOHN CROWLEY, CHARLES KERN and RICHARD T. CRICHE,

Respondents,

VS.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner.

Petition for Writ of Certiorari

STEVENSON, CONAGHAN, VELDE AND HACKBERT,
208 South LaSalle Street,
Chicago 4, Illinois,
Attorneys for Petitioner.

HARLAN L. HACKBERT,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO. — FRANKLIN 2-6521

INDEX

PAGE

Argument 19

Judgment of Appellate Court 53, 54

Jurisdictional Statement 2

Opinion of Appellate Court 2, 29

Order Denying Leave to Appeal 55

Question Presented 2

Statement of the Case 3

Statute Involved 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

JOHN CROWLEY, CHARLES KERN and RICHARD T. CRICHE,

Respondents,

VS.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner.

Petition for Writ of Certiorari

Your petitioner brings this petition for writ of certiorari, seeking a review by the Court of a novel and important question arising under the Federal Employer's Liability Act, namely the liability of the carrier for an occupational dermatitis contracted by certain susceptible employees from diesel locomotive servicing operations. This wholly new field of potential liability created by the widespread adoption of the diesel locomotive presents grave questions which should be authoritatively settled by this Court.

Opinion Below.

The opinion of the Appellate Court of Illinois for the First District is reported as *Crowley* v. *Elgin, J.&E. Ry. Co.*, 1 Ill. App. 2d 481, 117 N.E. 2d 843, and is printed as an appendix to this petition. Neither the trial court nor the Supreme Court of Illinois, in denying a petition for leave to appeal to that court, handed down opinions.

Jurisdiction.

The Appellate Court affirmed the judgment below upon condition that each plaintiff file a remittitur, which was accordingly done, and the judgment of the Appellate Court was entered on March 15, 1954. A petition for rehearing was denied by that court on March 23, 1954. A petition for leave to appeal from the judgment of the Appellate Court was denied by the Supreme Court of Illinois on September 15, 1954, thus making the judgment of the Appellate Court final for purposes of further review in this Court.

The petition is filed within ninety days from the denial of the petition for leave to appeal, and the jurisdiction of this Court to review the judgment of the Appellate Court is invoked under Title 28, U.S.C. §§ 1257 (3) and 2101 (C).

Question Presented.

The question presented by this petition is the sufficiency of the evidence to sustain the essential element of plaintiffs' case that prior to the time they became afflicted, the defendant carrier had actual or construction knowledge of the possibility that certain susceptible employees—who failed to use available sanitary facilities—might contact an occupational dermatitis from remaining too long in contact with the oils used in fueling and lubricating its diesel locomotives. Specifically the question is whether such actual or construction knowledge of the possible hazard may be inferred (1) from *subsequent* reports of diagnoses by a physician in private practice employed locally to treat defendant's employees; or (2) from general medical knowledge (not known to the railroad industry) that when these oils were used in certain concentrations in other forms in other industries, certain susceptible individuals developed dermatitis.

Statute Involved.

The only statute involved is the Federal Employer's Liability Act, Title 45 U.S.C. §§ 51-60, which insofar as pertinent here provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

STATEMENT OF THE CASE.

This is an action under the Federal Employer's Liability Act for occupational dermatitis resulting from contact with diesel fuel oil and lubricating oils in the monthly inspection and servicing of defendant's diesel locomotives. Suit was brought originally by the plaintiff Crowley; later by an amended complaint and second amended complaint the plaintiffs Kern and Criche joined in the action. (Abst. 1) The case was tried before Judge Lupe and a jury, which returned separate verdicts in favor of each plaintiff, assessing Crowley's damages at $42,800, Kern's at $28,900 and Criche's at $19,500. (Abst. 6, 152) Judgments were entered on the verdicts. (Abst. 6, 152) Defendant's motions for judgments notwithstanding the verdicts or in the alternative for new trial (Abst. 153-5) were denied. (Abst. 6, 155) Defendant appealed from the judgments entered on the verdicts and from the order denying its motions after verdicts. (Abst. 155)

The sufficiency of the evidence to support the verdict was raised by defendant's motions for judgment notwith-

standing the verdict or in the alternative for a new trial, and they were argued and decided adversely to defendant in the Appellate Court.

The Appellate Court affirmed the judgments on condition of remittiturs, reducing Crowley's judgment from $42,800 to $20,000, Kern's judgment from $28,900 to $10,000 and Criche's from $19,500 to $10,000.

Plaintiffs claim that they contracted an occupational dermatitis from coming in contact with diesel fuel oils and lubricating oils in the monthly servicing and inspection of defendant's diesel locomotives in the roundhouse at defendant's yard at East Joliet, Illinois. In 1948 defendant completed the conversion of its locomotives operating out of its East Joliet yard from steam locomotives to diesels; several months after the time he first started to work on diesel locomotives, each of the plaintiffs developed the dermatitis for which this suit is brought.

Because of the unusual nature and the importance of this case, we think it will be most helpful to the Court to set out in this statement of facts, first, the nature of dermatitis generally; second, the history of each of the plaintiffs; and finally, the evidence on the negligence charged.

1. The Nature of Dermatitis.

The term "dermatitis" means inflammation of the skin. (Abst. 26, 100, 106) The causes of dermatitis are varied. Dermatitis may be caused by bacteria, food or other substances taken internally, virus, pus-forming organisms, fungus. (Abst. 107) Contact dermatitis or dermatitis venanata—with which we are concerned here (Abst. 26, 102, 104, 105)—results from external contact with some substance which is irritating to the particular indi-

vidual. (Abst. 26, 107) Almost any substance—from household articles to industrial processes—may cause a contact dermatitis in a susceptible individual. (Abst. 26, 27, 40, 107, 115) This is true also of chromates in sufficient concentration and of petroleum derivatives. Substances which will cause a dermatitis in one individual may not cause it in another (Abst. 26, 107, 115); individual resistance varies (Abst. 107, 122) and as plaintiff's medical expert, Dr. Robin, testified, "You cannot forecast with any accuracy whether a given individual or a given group of individuals may contract a contact dermatitis". (Abst. 107)

The external factors involved in contact dermatitis are the extent and the frequency of the contact with the irritating substance and the period of time over which the individual is exposed; personal factors are the susceptibility of the individual, the lightness of his complexion, his age as affecting his capacity to harden his resistance to a new exposure or his loss of resistance to a previously non-irritating exposure and, most important, personal cleanliness in avoiding unnecessary contact with the irritant and in removing the contacted substance by promptly washing the exposed parts of the body. (Abst. 30, 33, 40, 41, 42, 103, 107, 110, 115, 116, 120, 121, 122) To effect a cure, contact with the offending substance must be terminated; if kept away from irritation a sufficient length of time (depending usually on the length and extent of prior contact), the individual may become entirely cured (Abst. 110, 121) and he may, by following proper precautionary measures, be able to return to his former occupation without further trouble. (Abst. 110, 120, 121, 122)

2. The History of the Plaintiffs.

John Crowley was first employed by defendant in 1913, and except when furloughed for lack of work, he had worked continuously for defendant since 1922. (Abst. 44) He was 61 years old at the time of trial. (Abst. 44) Prior to 1947, his work was that of a general machinist working on steam locomotives, mostly in the "back shop" where general repairs were made on the locomotives. (Abst. 44, 55) He had worked in the roundhouse on some occasions and was familiar with conditions there. (Abst. 56) In February, 1947, by virtue of his seniority, he "bid in" upon a vacancy in the roundhouse (Abst. 55, 56) and for the first time started to work on diesel locomotives, which were relatively new at that time. (Abst. 44, 58)

Each day a diesel locomotive would be brought into the roundhouse for monthly inspection and servicing. (Abst. 46, 56) The work would be done by a crew of eight to ten men, two of whom were machinists and two were machinist's helpers. (Abst. 46, 56) In removing the fuel oil filters, the machinist would come in contact with the fuel oil for a few minutes; in removing the lube oil filters and the sump strainer and in inspecting the crankcase and bearings, lubricating oils would get on his hands. (Abst. 46, 57, 57) He did this work every other day. (Abst. 57) Neither he nor the other plaintiffs had anything to do with mixing the cooling fluid or filling the cooling system or the fuel oil tanks of the engine. (Abst. 10, 11, 47, 58) In changing the packing in the water pumps, his hands would come in contact with the cooling fluid. (Abst. 47) When a leak permitted the oil and cooling fluid to mix—and it was hard to say how often that would happen (Abst. 60)—his only contact with the mixture

was that in the water pump and shaft; it was the job of the boilermaker to drain off the cooling fluid and of the pipefitter to drain off the oil. (Abst. 60)

In November, 1947, Crowley developed a rash on his hands and forearms. (Abst. 47, 48) He first went to his family doctor, Dr. Curtiss; then on December 22, 1947, he went to Dr. Meadows, the local company doctor, who soaked the arms in a solution. (Abst. 48) Dr. Meadows testified that according to his recollection and his records, Dr. Albers, his assistant, treated Mr. Crowley. (Abst. 23) On January 2, 1948, he went to the Public Health Institute in Chicago, which referred him to the Northwestern University Clinic, where he was examined and treated some 18 to 20 times. (Abst. 48-49, 64) In April, 1949 at the direction of his attorneys, he first went to Dr. Milton Robin, who examined him and prescribed treatment from time to time thereafter. (Abst. 50, 100-102)

Upon the advice of the dermatologist at the Northwestern Clinic, Crowley remained away from work until the latter part of January, 1948; then he worked four days. (Abst. 65) On February 7, 1948, he was examined by Dr. Bennett, the railroad's chief surgeon, who said he would release Crowley to work involving "no dirt, grease or oil". (Abst. 65) Under the machinist's union agreement, however, Crowley could not take another machinist's position by displacing another man; he could only bid in on a vacancy (Abst. 66, 95) and similarly, the company could not transfer him without his consent or refuse to allow him to work at any job to which his seniority entitled him. (Abst. 81, 95, 126) Crowley reported for work on February 9, 1948, but did not actually return to work until February 17 or 18, 1948. (Abst. 65) When he returned to work he had a conversation with Mr. Paul Verd,

defendant's superintendent of motive power, who read to Crowley and discussed with him a letter, the substance[1] of which was that the doctors had advised him not to work with oils and greases, but that if he returned to work, he did so upon his own responsibility. (Abst. 66-67, 133)

At this time Crowley had been advised by his family doctor that his work was the cause of his dermatitis (Abst. 63) and by the two company doctors, Bennett and Meadows, not to return to work around diesel oil (Abst. 64-65, 139) and the dermatologist at the Northwestern Clinic had advised him to remain away from diesel work. (Abst. 65) Nevertheless, on February 19, 1948, he returned to his old job, which the company could not refuse him or transfer him from without his consent (Abst. 81, 95, 126), and although there have since been vacancies in jobs in the back shop upon which he could have bid successfully by virtue of his seniority (Abst. 67, 137), he remained at that same job until he bid in another roundhouse job in August, 1952. (Abst. 67)

According to the tabulation of assigned days off duty, Crowley lost 46 days from work through February, 1948. (Abst. 53) He lost several days each month thereafter. The rash spread to his face and neck and later to his legs and feet. (Abst. 49, 50, 101, 102) He went to Hot Springs for three weeks and his condition improved. (Abst. 49) He was off work for several weeks in the summer of 1949 because of a spontaneous hemorrhage in the left leg, and during this time away from work his skin "improved tremendously". (Abst. 101, 102). When

---

[1] The text of the letter was incorporated into a question put to Crowley on cross examination, and he admitted Mr. Verd had read him a letter and given him a copy and they had discussed its contents. (Abst. 65-66, 68) Later the Court refused to admit the letter itself into evidence. (Abst. 132-133)

he returned to work, the eruption returned within a few days. (Abst. 102) He was off work because of his skin condition from May 1 to August 10, 1952, losing a total of 73 working days, and he went again to Hot Springs (Abst. 54, 55, 102); at the end of that period, his skin "was the best he had ever seen it" (Abst. 102). At the time of trial in December, 1952, he had dermatitis in a "milder state" on his hands, wrists, forearms and ankles. (Abst. 102) In Dr. Robin's opinion this condition was permanent because of the length of time and frequency of his exposure. (Abst. 103)

Charles Kern had worked continuously for the E. J. & E. as a pipefitter since November, 1915, and he was the first man on the seniority list. (Abst. 72, 80) He was 68 years old at the time of trial. (Abst. 72) Prior to August, 1948, his work as a pipefitter had been assembling, dismantling and repairing the pipes of steam locomotives. (Abst. 72, 78) He worked on eight to twelve locomotives a day, both those in for monthly servicing and those in for minor repairs. (Abst. 72, 78) Upon the conversion to diesel operations, the character of his work changed and thereafter he worked exclusively on diesel locomotives. (Abst. 73, 78) His work included tightening, removing and repairing the pipes of the locomotives; he would disconnect the pumps but the machinists and machinist's helpers would actually handle their removal. (Abst. 72, 79, 82) In disconnecting the pumps, which would be possibly six times a week (Abst. 73), and in disconnecting the pipes of the oil systems, his hands would come in contact with the cooling fluid and the fuel oil; sometimes some might splash on his face, neck or feet. (Abst. 72, 79)

In January, 1949, he first noticed a reddening of his hands and a burning irritation; he thought the weather had chapped his hands. (Abst. 74, 79) Early in February he went to Dr. Meadows, who prescribed an ointment and then hospitalized him for two weeks. (Abst. 74, 79) From March 24, 1949 to July, 1949, he was under the care of Dr. Irving Cobin, a dermatologist to whom the Company sent him; after July, 1949 he was treated by Dr. Milton Robin. (Abst. 23, 25, 74)

Kern returned to work for a few days in April, 1949, and the rash "flared up again". (Abst. 75, 104) He went back to Dr. Cobin for treatment and, at his direction, remained away from work until June 1, 1949. (Abst. 75, 79, 104) His tabulation of assigned days off duty shows that he lost 90 days from work in this period. (Abst. 76) He continued to work in the roundhouse until the middle of July, 1949; then as the rash returned, at the suggestion of Dr. Bennett and with his own permission, Kern was transferred to the back shop. (Abst. 75, 81) After that, on account of the condition of his hands he lost three days from work in August and September, 1949, three days in the years 1950 and four days in 1951 (Abst. 76, 77, 79, 88), when his work would occasionally bring him in contact with diesel oil and his rash would flare up. (Abst. 111) At its worst in April, 1949, Kern had eruptions on his hands, fingers, wrists and arms, on his temples and neck, and on his buttocks and thighs. (Abst. 75, 104) By August 1949, the condition had nearly cleared up (Abst. 26); at the time of trial, the skin on his fingers, hands, wrists and to the forearms was "slightly reddened, thickened and dry" (Abst. 104), the elbows, temples, back, buttocks and thighs being clear (Abst. 111). Dr. Robin testified he had no

opinion whether this "fairly mild" eruption was permanent or not; if not further irritated, it might clear up altogether. (Abst. 104-105)

Richard Criche was 52 years old at the time of trial and had 32 years of seniority as a machinist. (Abst. 86) Prior to 1945, his work had been regularly in the back shop; in 1945 he bid in a job in the roundhouse and worked regularly on steam locomotives until the conversion to diesel operations in the middle of 1948. (Abst. 86, 92, 93) His work on diesel engines was of the same general nature as Crowely's; they worked the same turn. (Abst. 86, 93, 94)

In June, 1949, he noticed that his skin was itchy and blistered. (Abst. 88, 93) He went to Dr. Meadows, who referred him to Dr. Cobin who treated him until June, 1951. (Abst. 23, 26, 88) He saw Dr. Lawless in Chicago eleven times from March to June, 1950 and he went to Dr. Robin for examination but not treatment on two occasions. (Abst. 89, 105, 110, 111)

In July and August, 1949, he worked as a temporary foreman where he was not exposed to diesel oils and cooling fluids and the eruption cleared gradually (Abst. 88, 94, 105); back at his regular job, the rash broke out again and Dr. Cobin took him out of service in January, 1950 (Abst. 88, 94). He was out of service until March 30, 1950 losing 83 assigned days' work. (Abst. 90, 94) He then gave up the roundhouse job and returned to work in the back shop, where he was only occasionally exposed to oil and dirt on the wheels of the locomotives he was working on. (Abst. 88, 95) Occasionally he was required to work in the roundhouse a day or two at a time to fill a vacancy (Abst. 89) and on account of a

reduction in forces during the steel strike, he went back to the roundhouse in June, 1952, where he started to get a small rash. (Abst. 95) He was off work from August 7 to October 20, 1952, because of an accidental injury to his right hand; he then returned to the back shop job. (Abst. 91, 95)

At the time of trial, Criche had a "mild amount of dermatitis on the tops of the hands and wrists" with slight thickening of the skin and increased pigmentation. (Abst. 105) His condition was "approaching normality" and Dr. Robin had no opinion whether it was temporary or permanent. (Abst. 105, 106)

3. The Evidence as to Negligence.

The negligence charged in the complaint, in substance, was that defendant negligently "directed" the plaintiffs to work in oils used in lubricating, cleaning or servicing locomotives when it knew, or by the exercise of ordinary care should have known, that the oils were injurious to plaintiffs, and negligently failed to provide them with any protection from such oils. (Abst. 2-3) Over defendant's objection that it was outside the issues raised by the complaint (Tr. 5-12) plaintiffs were permitted to introduce evidence as to the effects of the chromate solution used in the cooling system of the diesel locomotives, on counsel's representation that at times the cooling fluid and the fuel oils became mixed together as the result of leakage. (Tr. 13-15 and Abst. 97)

At the time in question, defendant purchased its diesel fuel oil from Standard Oil Company under specifications. (Abst. 9) For use as an inhibitor of scale formation and electrolytic action in the cooling system of its locomotives, defendant purchased from Dearborn Chemical

Company a product known as No. 517 (Abst. 8, 11) whose formula was a trade secret (Abst. 15), but which was about two-thirds bichromate, which was within the general range of the chromate content of similar products (Abst. 16). Used in a ratio of fifty ounces of compound to one hundred gallons of water (Abst. 8), this produced a solution of 1 to 384, or less than three-tenths of one percent chromate. (Abst. 124) There was no evidence that defendant's specifications for diesel fuel oil or the cooling solution differed in any respect from those commonly used by other railroads.

Crowley was the first of defendant's employees to develop a dermatitis from working with diesel locomotives. (Abst. 40, 129) Prior to November, 1947, when Crowley's dermatitis first appeared, Dr. Bennett, defendant's chief surgeon, knew that chromate in powdered form and petroleum in certain concentrations caused skin irritation to some susceptible people. (Abst. 32, 33) He had never heard of any case of a railroad employee claiming to have contracted such a dermatitis. (Abst. 41) Defendant's general superintendent, Paul Verd, had worked with diesel locomotives since 1935, first in the servicing department of Electro Motor Division of General Motors, which manufactures diesel locomotives, then in successive positions with defendant in charge of its diesel operations, interrupted by four and a half years' service in diesel submarine motor maintenance during World War II. (Abst. 127-128) He had never heard of any case of dermatitis due to diesel fuel oil until Crowley's case. (Abst. 128, 129) Dr. Louis Schwartz is the senior author of the outstanding text on "Occupational Diseases of the Skin" and was the organizer in 1930, and until his retirement in July, 1947, the head of

the dermatology department of the United States Public Health Service. (Abst. 114, 115, 116) As such it was his job to keep abreast of industrial developments and to study occupational dermatitis hazards and devise preventive measures to overcome them. (Abst. 116) At the time of his retirement he had heard of no case of dermatitis of a railroad employee from diesel fuel oils or cooling solutions; so far as he knew up to that time there had not been any cases of dermatitis in the railroad industry from the use of diesel fuel oils. (Abst. 116, 117) He first learned of any such cases a year or two later. (Abst. 116, 117) None of the other three medical witnesses for the plaintiff testified to any earlier cases of dermatitis in railroad employees. There was no evidence that prior to that time any railroad employee anywhere whether engaged in diesel operations or not, had in fact contracted such a dermatitis.

Plaintiffs' counsel interrogated the medical witnesses about their familiarity with certain medical publications, but none of the articles themselves were admitted into evidence. In response to a question as to the period of time the effect of chromate had been known, Dr. Robin referred to the text-book "Occupational Diseases of the Skin", by Drs. Schwartz, Tulipan and Peck, published in 1947 that dealt with and discussed the various industries in which chromates were used and the various reactions from exposure (Abst. 98), and in response to a similar question as to knowledge of the effect of petroleum, he referred to the same text-book. (Abst. 99) On cross examination he was shown a copy of the book and he admitted that in the chapters or dermatitis caused, by chromates and petroleum derivatives, there was no reference to those substances as used in the railroad

industry. (Abst. 108-109) Later, Dr. Schwartz, the senior author of the book, testified that not until a year or two after July, 1947, did he hear of any such dermatitis cases in the railroad industry. (Abst. 116-117) Dr. Robin also referred to an article in the Foreign Letters Section of the Journal of the American Medical Association for October 10, 1931, dealing with skin sensitivity to chrome compounds in the printing industry and to an article by Dr. Schwartz in the Journal of Industrial Medicine in 1942 dealing with dermatitis among operators of air conditioning equipment (Abst. 99, 108), but on cross examination he admitted he did not know whether chromates were used in the printing and air conditioning industries in original powdered form or in solution, although the hazard and reaction were different. (Abst. 107-108)

Dr. Robin also referred to an article entitled "Can Diesel Fuel Oils Cause Dermatitis" in the August 25, 1945 issue of the Journal of the American Medical Association. (Abst. 99) This article appeared in the "Queries and Minor Notes" Section, a sort of "question box", under a caption that the answers did not represent the opinion of any official bodies. (Abst. 22, 42) During the cross examination of Dr. Schwartz, it developed that he had written the answer to the question which had been sent in by a Dr. Stivers, and he testified that it was not then a matter of common knowledge that men coming in contact with diesel fuel oil received dermatitis from it; that the question was referred to him for reply because it was not a matter of public knowledge, and that when he answered the question he thought it related to diesel trucks, for the problem of using diesel fuel oil in locomotives had not then come to his attention. (Abst. 122-123)

There was no evidence that any one connected with the defendant at the time had read any of these publications (Abst. 18, 29, 33) or that they were circulated among persons in the railroad industry. (See defendant's objection at Abst. 18, 21, 98-99.) The first published article shown to have referred to dermatitis in the railroad industry was published November 17, 1951. (Abst. 124) Each of these plaintiffs had incurred his dermatitis prior to that date.

By 1951 the defendant had taken intensive measures to counteract the dermatitis hazard. Starting in 1949, new washroom facilities had been constructed in the roundhouse, adjacent to the diesel work area; late in 1948 or early in 1949, protective creams and ointments were made available and special detergents with a corn meal scrubber were supplied at wash stands in the roundhouse and later in the new roundhouse washrooms. (Abst. 10-11, 131-132) Early in 1950 by an article in the company magazine (Abst. 30), by posted bulletins (Abst. 84), by safety meetings and by letters read and distributed individually to all employees in the roundhouse and machine shops (Abst. 10, 133, 135) these employees were warned of the possibility of contracting dermatitis and of the personal hygienic measures to be taken to avoid contracting such dermatitis. (Abst. 10-11, 29-30, 42, 131, 132, 133, 136, 137) Dr. Schwartz made a three day inspection of defendant's facilities in November, 1951 (Abst. 117); he found them in good, sanitary condition, with most of his basic recommendations already in force. (Abst. 117, 120) He also examined twenty-six of the thirty-six individuals (out of 900 employees) who had reported cases of dermatitis in the past five years; thirteen had no skin lesions at the time, seven had non-occu-

pational skin diseases and six had active dermatitis of probable occupational origin, none severe enough to be disabling. (Abst. 118) He did not examine any of the plaintiffs. (Abst. 122)

These preventive measures were the result of investigation of the practices of other industries by both the operating and the medical departments of defendant following Crowley's initial outbreak of dermatitis. (Abst. 41, 131) Prior to that time, there were washroom facilities with individual wash basins, shower stalls and toilets available in the main shops, immediately adjacent to the "old roundhouse" where most of the roundhouse employees kept their clothes and equipment. (Abst. 130) In the roundhouse itself, at first there was only running cold water (Abst. 45, 62); late in 1949 both hot and cold running water were made available there. (Abst. 131) Outside the section of the roundhouse where plaintiffs worked, about fifty feet away, was a washroom with hot and cold water, washstands and showers. (Abst. 85-86, 130-131) There was a conflict in the evidence as to who were permitted use of this washroom. (Abst. 69-70, 85-86, 112) Kern testified that the reason the roundhouse employees did not like to use that washroom was that it was also used by yard and other employees, whom Criche referred to as "muckers." (Abst. 86, 112) None of the plaintiffs used the washing facilities available to them prior to the outbreak of their dermatitis or, for that matter, those supplied later. Crowley washed only at the noon hour. (Abst. 68) Kern did not ever wash with soap and water, but used kerosene and waste to clean his hands (Abst. 82), a practice which Dr. Schwartz testified was more likely to cause dermatitis than any other (Abst. 119). Criche used kerosene and oil to clean

his hands, but he never washed himself at work. (Abst. 113) After the protective creams and ointments and the detergent and scrubbing agent were supplied, Crowley used the protective creams only two days; he used the detergent but not the scrubber (Abst. 68); Kern used the protective creams only half a dozen times and he never used the corn meal scrubber (Abst. 80); Criche has never used these preventatives (Abst. 91).

ARGUMENT.

The Appellate Court erred in holding the evidence sufficient to take to the jury the issue whether defendant had actual or constructive knowledge of the hazard of dermatitis in contact with diesel oils.

Like the occupational disease cases under state statutes which reached the courts in the mid-thirties,[1] this case is the forerunner of a group of cases in a wholly new field of liability, that of claims for occupational dermatitis brought under the Federal Employer's Liability Act. Specifically the legal question presented is whether or not prior to the time these three plaintiffs first contracted a dermatitis from contact with the oils used as fuel and lubricants in its diesel locomotives—and these three plaintiffs were the first of a handful of defendant's employees to become so afflicted and were also, so far as this record discloses, the first employees of any railroad in this country to be so afflicted—the defendant had actual or constructive knowledge of the possibility of a dermatitis hazard to its employees from remaining too long in contact with the diesel oils. A jury found for the plaintiffs; the Appellate Court, after reducing the verdicts in the aggregate by more that 50%, sustained the finding of liability.

The employer's actual or constructive knowledge of the existence of an occupational disease hazard in its operations is an essential element of a cause of action for occupational disease under the Federal Employer's Liability Act. *Urie* v. *Thompson,* 337 U.S. 163. The plaintiffs here sought to show defendant's knowledge prior to the time

---

[1] *Parks* v. *Libby-Owens Ford Glass Co.,* 360 Ill. 130; *Boshuizen* v. *Thompson & Taylor Co.,* 360 Ill. 160; *Vallat* v. *Radium Dial Co.,* 360 Ill. 407; *Novarro* v. *Illinois Steel Co.,* 360 Ill. 483.

that these plaintiffs contracted the disease by three methods: first, by interrogating the medical and expert witnesses as to their familiarity with articles published in medical journals on the effects of petroleum or chomate solutions in contact with human beings; secondly, by the reports of defendant's local doctor at Joliet, Illinois to the defendant's chief surgeon concerning these three plaintiffs; and finally, by proof of general knowledge of the existence of a dermatitis hazard in other industries from the use of petroleum derivatives or chromate solutions.

The Appellate Court held that the questions concerning the medical publications on dermatitis were improper, but held that "inasmuch as there is strong support in the record for the verdicts on the question of liability • • • under all the circumstances we do not think that defendant was harmed by the admission of the evidence." We may, therefore, disregard the testimony concerning the medical publications as tending to support the judgments below. We do insist, however, that in view of the importance which this testimony assumed before the jury as each witness in turn was interrogated concerning these publications in isolated medical journals, that the effect of the allowance of the improper line of questioning was definitely prejudicial to the defendant and when we consider the jury's obvious misconception of the damage issue, as evidenced by the substantial remittiturs which the Appellate Court required as a condition of affirming the judgments, that the error cannot be said not to have affected the jury's view of the liability issues.

The reports of defendant's local doctor at Joliet, a physician engaged in general practice (Abst. 24) to the defendant's chief surgeon in which he reported his diagnosis as contact dermatitis from diesel oil (Abst. 34, 35, 36, 38)

were received in evidence not as part of the doctor's examination as a witness but during the examination of defendant's chief surgeon on the theory that as reports made by the local doctor to him as chief surgeon, they constituted "admissions against interest." The Appellate Court sustained their receipt in evidence on this theory. We submit that this was error and that these reports cannot be relied upon to support the judgments below.

The reports were obviously hearsay and therefore incompetent and inadmissible. *Oard* v. *Dolon,* 320 Ill. 371, 378; *Lewandowski* v. *Juzak,* 305 Ill. 612, 614. The only theory upon which a doctor's written diagnosis has been held permissible in evidence as an "admission against interest" has been where the reported diagnosis was inconsistent with his testimony as a witness upon the trial. *Beringer* v. *Lackner,* 331 Ill. App. 591. Here there was no dispute about the diagnosis of the plaintiffs' condition nor was there any inconsistency with Dr. Meadows' testimony as a witness. The "admissions" if they be considered such, were those of a private practitioner employed to treat the plaintiffs; he was not an officer, agent or employee of the railroad but his diagnosis was his personal, expert opinion. What he diagnosed the condition of these plaintiffs to be, *after they had become afflicted,* and what he then reported to the defendant cannot be regarded as knowledge with which the defendant was chargeable *prior to that time,* nor was his expert, scientific knowledge as a private practitioner chargeable to the defendant prior to that date. *Spence* v. *Bath Iron Works Corp.,* 140 Me. 287, 37 A. 2d 174. We submit that the reports of Dr. Meadows were incompetent to prove that prior to their receipt the defendant had any knowledge of the possibility of a dermatitis hazard from contact with diesel oils.

This leaves only the matter of general knowledge about petroleum derivatives and chromate solutions as the basis for the Appellate Court's holding that "there is strong support in the record for the verdicts on the question of liability."

We submit that the fact that there may have been some general knowledge from the experience of other industries in the use of petroleum derivatives and chromates in wholly undisclosed concentrations and in altogether different uses is not sufficient to charge the railroad industry with knowledge that diesel locomotive operations presented a dermatitis hazard to their employees. This issue must be judged against the factual background of this case which is undisputed. The defendant began to use diesel locomotives in its switching operations and in its main-line operations originating in its East Joliet yard in 1947. There is no evidence that prior to that time any railroad employee, either in the defendant's employ or in the employ of any railroad, had ever been known to contract a contact dermatitis from the oils used in fueling, servicing and lubricating diesel locomotives. Defendant's superintendent of motive power, Mr. Verd, who had worked with diesel engines since 1935, first with the manufacturer, then with the defendant, then for four and a half years in diesel submarine motor maintenance work during World War II, and after the war again with the defendant (Abst. 127-128) had never heard of a case of dermatitis claimed to be due to diesel oils prior to the outbreak of Crowley's case (Abst. 128-129). Defendant's chief surgeon had never before heard or learned of a case of dermatitis in the railroad industry from either diesel fuel oil or the cooling solution containing chromate (Abst. 39, 40). Dr. Louis Schwartz, the organizer and until 1947 the head of the

Dermatology Department of the United States Public Health Service, whose job it was to keep informed as to occupational disease hazards in industry (Abst. 114, 115, 116) and who had access to and read all current medical literature on the subject (Abst. 122), had never heard of any cases of dermatitis in the railroad industry from the use of diesel fuel or lubricating oils or chromate solutions at the time of his retirement in July of 1947 (Abst. 116-117).

It is true that it was a matter of general medical knowledge that petroleum derivatives in certain concentration and chromates in their original powdered form were known to defendant's chief surgeon as a cause of irritation to certain susceptible people (Abst. 32-33, 39) but this is true of nearly every substance. All of the medical witnesses agreed that almost any substance may cause a dermatitis in a susceptible individual (Abst. 26, 27, 40, 107, 115). Knowledge that a substance in concentrated form is harmful does not establish that an employer knew or should have known that the diluted quantities or intermittent contact with those substances used in its diesel operations are harmful. The court made it clear in *Pinkley* v. *Chicago & E. I. R. Co.,* 246 Ill. 370, that an employer is not liable to the first of its employees to contract a dermatitis from substances handled in the course of his work. In that case the plaintiff claimed to have sustained a severe injury as the result of a dermatitis contracted while unloading a car of piling which had been freshly treated with creosote. The court, in holding that there was no liability, stated:

> "So far as the record discloses appellee was the first person to sustain any serious or permanent injuries from handling timbers treated with creosote during the

> many years this substance has been in use as a preservative for wood. Under such circumstances, a finding that appellant knew, or by exercising ordinary diligence might have known, that the coal-tar preparation was liable to produce the injuries of which the appellee complains, is manifestly without any evidence whatever to support it. If the appellant did not know, or by exercising ordinary diligence could not have known, that such injuries were liable to result, then the law did not impose any duty upon it to warn appellee of the danger of receiving such injuries, before or at the time of giving the order which appellee alleges was negligently given."

The same rule has been applied in cases arising in other states under employer's liability laws when liability was first sought to be imposed upon an employer under similar circumstances. See *Grammer* v. *Mid Continent Petroleum Corp.* (C.C.A. 10) 71 F. 2d 38, 44; *Allen* v. *Shell Petroleum Corp.*, 146 Kan. 67, 68 P. 2d 651; *Spence* v. *Bath Iron Works*, 140 Me. 287, 37 A. 2d 174. These cases apply the common sense rule that there is no liability for an occupational disease contracted by an employee more susceptible than others resulting from contact with a substance which was not inherently dangerous except in concentrated form. As the court pointed out in the *Grammer* case, nicotine in concentrated form is a deadly poison yet millions of persons smoke cigarettes without poisonous effects. This too is the rule of the "manufacturer's products liability cases." *Stanton* v. *Sears Roebuck & Co.*, 412 Ill. App. 496; *Bennett* v. *Pilot Products Co.*, (Utah 1951) 235 P. 2d 525. The principle of those cases is applicable to Federal Employer's Liability cases. *Creamer* v. *Ogden Union Ry. Co.* (Utah 1952) 242 P. 2d 575, 577.

The products used by the defendant from which these plaintiffs' dermatitis is claimed to have resulted, were stan-

dard products purchased in the open market under brand or trade names from reputable manufacturers. If merely because there is general knowledge that petroleum derivatives may cause a contact dermatitis to certain susceptible individuals, an employer is required to conduct research into the possible existence of such a hazard and to warn his employees and to take measures to protect them against the consequences of their lack of personal cleanliness, then every employer must take such steps for the protection of his employees. There is no different rule of negligence which binds railroad companies which does not apply equally to all other employers. If liability may be imposed upon this defendant merely because of this supposed general knowledge of the characteristics of petroleum derivatives, then every member of this court or his wife, who provides a household servant with standard brand detergents (a very prolific source of dermatitis) or with polishes or waxes in common usage without warning the servant of the possible danger and providing preventative measures, is equally guilty of negligence and is equally liable should that servant contract a rash or skin ailment. Every filling station operator who is not under a state Workmen's Occupational Diseases Act is liable in negligence to his employees who come in contact with gasoline and motor oils even though he may never have known or had any means of knowing about either the hazard or the necessity of insisting upon high standards of personal cleanliness for his employees. Common foods like strawberries and chocolate are a frequent cause of dermatitis. Are the sellers of those goods in the open market liable to their customers if they fail to warn of a hazard? Is a restaurant liable to the patron whose dermatitis stems from eating strawberry shortcake because the menu did not carry a warning of the possibility of a strawberry rash?

These questions are not asked in a facetious spirit. These examples are presented because they demonstrate that the duty imposed upon the railroad industry by the opinion of the Appellate Court in this case is one which is squarely at odds with reason and common sense. These plaintiffs were the first men of their class to become afflicted with this dermatitis. The best informed expert in the world did not recognize the possibility of such a hazard prior to the time that Crowley and the other two plaintiffs became afflicted. How then can "reasonable care" require of this defendant a higher degree of knowledge than the best informed person in the world had on this subject? How can this defendant be held to a standard of care in preventative measures which even the United States Public Health Service, with all the experience of other industries at its command, did not recognize as needed in the railroad industry?

We are not dealing here with a substance known to be poisonous even in small quantities such as the carbon monoxide gas in *Baumgartner* v. *Pennsylvania R. Co.*, 292 Pa. 106, 140 A. 622 or the oxalic acid which the defendant in *Harvey* v. *Welch*, 86 N. H. 72, 163 A. 417, "admittedly knew to be poisonous." We are dealing here with substances normally used in complete safety by persons in all walks of life. These men contracted their dermatitis because they failed to use the sanitary facilities which were available, for personal habits of cleanliness are the most important factor in the avoidance of contact dermatitis. (Abst. 40, 41, 42) The significant fact in this case is that these three plaintiffs did not avail themselves either of the sanitary facilities originally provided or of the more extensive facilities later installed. (Abst. 68, 82, 113).

In the court below, the plaintiffs relied upon and the Appellate Court cited *Young* v. *Pennsylvania R. Co.* (C.A.

2d) 197 F. 2d 727, and plaintiff also cited to the court the decision now reported as *Evinger* v. *Thompson* (Mo. 1954) 265 S.W. 726. But while the question of the carrier's actual or constructive knowledge was argued *pro forma* in the *Young* case, none of the authorities relied upon by this defendant was cited to the court in the briefs in that case and the points urged in the *Evinger* case were apparently not properly raised upon the record in the court below so as to require consideration by the reviewing court. Yet in both cases, despite these limitations upon the presentation of the question, there were dissents from the majority opinion. We submit these cases do not settle the question which is so important to the railroad industry which is presented by these occupational dermatitis cases. The issue is important and the decision below is in conflict with prior decisions of this and other courts upon the same or related questions. We submit that the issue is properly one for authoritative determination by this Court and that the petition for certiorari should be granted to review this question.

Finally we submit that the holding of the Appellate Court that these verdicts were excessive deprives them of any weight which may properly be given to a jury's verdict. The Appellate Court reduced the judgment in Crowley's favor from $42,800 to $20,000, Kern's judgment from $28,900 to $10,000, and Criche's judgment from $19,500 to $10,000. In the aggregate the remittiturs required were approximately 57% of the amounts of the verdicts originally returned by the jury.

If the jury were more than 50% wrong in their determination of the issues of damage which were submitted to them for decision we think it is a fair conclusion that they were more than half wrong likewise in their determination

of the liability questions. Particularly that is true where, as here, improper questions were asked of the medical and expert witnesses concerning medical publications, thus conveying to this undiscriminating jury the notion that there was a substantial body of available medical literature on the problems presented by this case. We submit that the amount of the remittiturs required by the Appellate Court and acceded to by the plaintiffs, establish that the jury in this case wholly misconceived the damage issue and by the same token they must have equally misunderstood the liability issues. We submit that this significant factor in this case strips these verdicts of all weight which might normally attach to a jury verdict in a contested case and it was an abuse of discretion as a matter of law not to vacate these verdicts in their entirety and remand the case for new trial.

CONCLUSION.

Your petitioner respectfully prays that this court grant a writ of certiorari to review the decision of the Appellate Court of Illinois for the First District, affirming the judgment of the Superior Court of Cook County, because of the importance of the issues presented and the dangerous precedent upon far-reaching questions of negligence established by the opinion below.

HARLAN L. HACKBERT,
Attorney for Petitioner.

APPENDIX.

Opinion of the Appellate Court.

The opinion of the Appellate Court which is reported as *Crowley* v. *Elgin J. & E. Ry. Co.*, 1 Ill. App. 2d 481, 117 N. E. 2d 843, is as follows:

46096

John Crowley, Charles Kern and Richard T. Criche,

Appellees,

v.

Elgin, Joliet and Eastern Railway Company, a corporation,

Appellants.

} Appeal from Superior Court Cook County

Mr. Justice Burke Delivered the Opinion of the Court.

John Crowley, Charles Kern and Richard T. Criche filed a complaint in the Superior Court of Cook County against the Elgin, Joliet and Eastern Railway Company under the Federal Employers' Liability Act for occupational dermatitis resulting from contact with diesel fuel oil and lubricating oils in the monthly inspection and servicing of defendant's diesel locomotives. A jury returned separate verdicts in favor of each plaintiff, assessing Crowley's damages at $42,800, Kern's at $28,900 and Criche's at $19,500. Defendant's motions for judgments notwithstanding the verdicts or, in the alternative, for a new trial, were denied. A separate judgment was entered in favor of each plaintiff, to reverse which defendant appeals.

The evidence establishes that plaintiffs contracted occupational dermatitis from coming in contact with diesel fuel oils and lubricating oils in the monthly servicing and in-

spection of defendant's locomotives in the warehouse at defendant's yard at East Joliet, Illinois. The plaintiffs and the defendant were engaged in interstate commerce. The word "dermatitis" means inflammation of the skin. The causes of dermatitis are varied. It may be caused by bacteria, food or other substances taken internally, virus, pus-forming organisms and fungus. Contact dermatitis, with which plaintiffs are afflicted, results from external contact with some substance which is irritating to the particular individual. Almost any substance, from household articles to industrial processes may cause a contact dermatitis in a susceptible individual. This is true also of chromates in sufficient concentration and of petroleum derivatives. Substances which will cause a dermatitis in one individual may not cause it in another; individual resistance varies. The external factors involved in contact dermatitis are the extent and frequency of the contact with the irritating substances and the time of individual exposure; personal factors are the susceptibility of the individual, the lightness of his complexion, his age as affecting his capacity to harden resistance to a new exposure, or his loss of resistance to a previously nonirritating exposure and personal cleanliness in avoiding unnecessary contact with the irritant and in removing the contacted substance by promptly washing the exposed parts of the body. To effect a cure, contact with the offending substance must be terminated. If kept away from the irritation a sufficient length of time, depending usually on the length and extent of prior contact, the individual may become entirely cured, and he may, by following proper precautionary measures, be able to return to his former occupation without further trouble.

The action is predicated upon alleged violation of the Federal Employers' Liability Act, in that the defendant

was negligent in failing to take reasonable precautions, discoverable by the exercise of ordinary care, to protect plaintiffs from the occupational hazard inherent in their work in and about diesel fuel and lubricating oils, and that as a result of one or more of the negligent acts of the defendant, each of the plaintiffs became and is afflicted with dermatitis. Defendant maintains that it cannot be held liable for the contact dermatitis with which each plaintiff became afflicted because the evidence fails to prove that it had actual or constructive knowledge of the hazard of dermatitis, or that it was negligent as charged. John Crowley was first employed by defendant in 1913, and except when furloughed for lack of work, he had worked continuously for it since 1922. He was 61 years of age at the time of trial. He was classified as a general machinist. Between 1920 and 1947 he did general repair work in the "back shop" at Joliet on steam locomotives. In 1936 defendant began to replace its steam locomotives with diesel locomotives. The changeover from steam to diesel locomotives was completed by the end of 1949. Crowley had worked in the roundhouse on some occasions and was familiar with conditions there. In February, 1947, by virtue of his seniority, he "bid in" upon a vacancy in the roundhouse at East Joliet, and for the first time started to work on diesel locomotives. He was in good health. Prior to February, 1947 he had no contact with diesel fuel oil. He had an eighth grade education. He had not been instructed by the defendant as to the possible ill effects of coming in contact with this oil. No orders, written or otherwise, were received by him on this subject from his superiors. Prior to November, 1947, when he first became afflicted with dermatitis, he had no skin affliction of any kind.

Each day a diesel locomotive would be brought into the roundhouse for monthly inspection and servicing. The

work would be done by the crew of eight to ten men, two of whom were machinists and two machinist's helpers. In removing the fuel oil filters, the machinist would come in contact with the fuel oil for a few minutes. In removing the lube oil filters and the sump strainer and inspecting the crankcase and bearings, lubricating oils would get on his hands. He did this work every other day. Neither he nor the other plaintiffs had anything to do with mixing the cooling fluid or filling the cooling system or the fuel oil tanks of the engine. In changing the packing in the water pumps, his hands would come in contact with the cooling fluid. When a leak permitted the oil and cooling fluid to mix—and it was hard to say how often that would happen—his only contact with the mixture was that in the water pump and shaft. It was the job of the boilermaker to drain off the cooling fluid and of the pipefitter to drain off the oil. In this work his hands and other parts of his body would come in contact with diesel and lube oils. He came in contact with these fuels every working day from February, 1947 to November, 1947, when he first developed a rash on his hands and arms as far as his elbows. He first went to his family physician in Joliet on November 20, 1947. When his condition did not improve he asked his foreman to send him to the hospital. He was then sent to the Silver Cross Hospital in Joliet, where he saw Dr. William A. Meadows, the local surgeon for the defendant. Dr. Meadows testified that according to his recollection and records, Dr. Albers, his assistant, treated Crowley.

Dr. Meadows diagnosed Crowley's condition as contact dermatitis from diesel oils. He continued to treat him until after January, 1948. When the condition failed to improve he sent Crowley to the Northwestern University Clinic in Chicago. On January 2, 1948, Crowley

went to the Public Health Institute in Chicago, which referred him to the Northwestern University Clinic, where he was examined and treated 18 to 20 times. When Dr. Meadows first saw Crowley on December 22, 1947, he made a report to defendant's chief surgeon, Dr. R. J. Bennett in Chicago, on the forms provided by the defendant. In that report he found that Crowley's condition was caused by "working near diesel oil" and made a diagnosis of Crowley's malady as "contact dermatitis from diesel oil." Upon the advice of the dermatologist at the Northwestern Clinic, Crowley remained away from work until the latter part of January, 1948; then he worked four days. On February 7, 1948, he was again examined by Dr. Bennett, defendant's chief surgeon, who said he would release him to work involving "no dirt, grease or oil." Under the machinist's union agreement, Crowley could not take another machinist's position by displacing another man. He could only bid in on a vacancy. Similarly, the defendant could not transfer him without his consent or refuse to allow him to work at any job to which his seniority entitled him. He reported for work on February 9, 1948, but did not actually return to work until February 17, 1948. When he returned to work he had a conversation with Paul Verd, defendant's superintendent of motive power, who read and discussed with him a letter, the substance of which was that the doctors had advised him not to work with oils and greases, but that if he returned to work he did so upon his own responsibility.

At this time Crowley had been advised by his family physician that his work was the cause of his dermatitis and by the two company doctors not to return to work around diesel oil, and the dermatologist at the Northwestern Clinic had advised him to remain away from diesel

work. He returned to his old job on February 17, 1948, which the defendant could not refuse him or transfer him from without his consent. Although there have since been vacancies in jobs in the back shop upon which he could have bid successfully by virtue of his seniority, he remained at the same job until he bid in another roundhouse job in August, 1952. According to the stipulation of the days off duty, Crowley lost 46 days from work through February, 1948. He lost several days each month thereafter. The rash spread to his face and neck and later to his legs and feet. He went to Hot Springs for three weeks and his condition improved. He was off work for several weeks in the summer of 1949 because of a spontaneous hemorrhage in the left leg, and during this time away from work his skin "improved tremendously." When he returned to work, the eruption returned within a few days. He was off work because of his skin condition from May 1 to August 10, 1952, losing a total of 73 working days. He went again to Hot Springs. At the end of that period the condition of his skin was improved. At the time of the trial in December, 1952, he had dermatitis in a "milder state" on his hands, wrists, forearms and ankles. In the opinion of Dr. Milton Robin, this condition was permanent because of the length of time and frequency of his exposure. Crowley had lost approximately 329 days from his work on account of the dermatitis from December, 1947 to September, 1952. His lost time and medical expenses total approximately $5,000.

Charles Kern had worked for defendant as a pipefitter since November, 1915, and was the first man on the seniority list. He was 68 years old at the time of the trial. Prior to August, 1948, his work as a pipefitter had been assembling, dismantling and repairing the pipes of

steam locomotives. Upon the conversion to diesel operations, the character of his work changed and thereafter he worked exclusively on diesel locomotives. His work included tightening, removing and repairing the pipes of locomotives. In disconnecting the pumps and the pipes of the oil systems, his hands would come in contact with the cooling fluid and the fuel oil. Sometimes some might splash on his neck, face or feet. In January, 1949, he first noticed a reddening of his hands and a burning irritation. He thought the weather had chapped his hands. Early in February he went to Dr. Meadows, who prescribed an ointment, and then hospitalized him for two weeks. Prior to February, 1949, he was in good health and had no skin affliction. He had never made a study of the ill effects of working with diesel oil and did not know prior to that time that contact with the oil would affect him. No one had ever told him of the ill effects therefrom. He first saw Dr. Meadows on February 5, 1949, who found that he had "an itch, rash, on the back of his hands and forearms." On Dr. Meadows' orders he was hospitalized for two weeks. Dr. Meadows treated him for a time and when he apparently did not improve he sent him to defendant's dermatologist, Dr. Irving M. Cobin. Dr. Meadows made a final report of his examination of Kern to defendant's chief surgeon, Dr. Bennett, in which he found the cause of Kern's condition: "Working in diesel oil developed rash on hands," and made a diagnosis of "contact dermatitis of hands and forearms."

Kern returned to work for a few days in April, 1949, and the rash flared up again. He went back to Dr. Cobin for treatment and at his direction remained away from work until June 1, 1949. He lost 90 days from work in this period. He continued to work in the roundhouse until the middle of July, 1949. Then as the rash returned, at

the suggestion of Dr. Bennett and on his own volition, he transferred to the back shop. After that, on account of the condition of his hands, he lost 3 days from work in August and September, 1949, 3 days in 1950 and 4 days in 1951, when his work would occasionally bring him in contact with diesel oil and his rash would flare up. At its worst in April, 1949, he had eruptions on his hands, fingers, wrists, arms, temples, neck, buttocks and thighs. By August, 1949, the condition had nearly cleared up. At the time of the trial the skin on the fingers, hands, wrists and forearms was "slightly reddened, thickened and dry," the elbows, temples, back, buttocks and thighs being clear. Dr. Robin, testifying for plaintiff, said he had no opinion whether this "fairly mild" eruption was permanent or not, and that if not further irritated, it might clear up altogether. Kern described the present condition of his spine, face and neck as "itchy" and that "since 1949 the condition of my skin has changed very little. It bothers me very bad and the irritation is still severe." He lost a total of 118 days from his work, making the salary loss during that period of time approximately $2,500.

Richard T. Criche was 52 years old at the time of the trial and had 32 years of seniority as a machinist. Prior to 1945 his work had been regularly in the back shop. In 1945 he bid in a job in the roundhouse and worked regularly on steam locomotives until the conversion to diesel operations in the middle of 1948. His work on diesel engines was of the same general nature as Crowley's. In the early part of 1948 he was assigned to work on diesel locomotives exclusively. In connection with his work on these engines his hands would become saturated with fuel oil and it would sometimes get on his face and clothes. Prior to commencing work on the diesel locomotives he did not know anything about danger from fuel and lubri-

cating oils. No one had given him any instructions about the danger of exposure to the oils. He had an eighth grade education and had never had any training in this connection. The defendant did not furnish him with protective ointments, soaps, scrubbing fluids, gloves or other protective devices prior to June, 1949. In June, 1949 his skin developed a burning and itchy sensation and had little water blisters. He saw his foreman, who sent him to Dr. Meadows. He was then referred to Dr. Cobin, who commenced to treat him on June 7, 1949. He remained under the care of Dr. Cobin until June 28, 1951. Dr. Cobin diagnosed his ailment as "contact dermatitis." Dr. Meadows, in his official report to Dr. Bennett dated June 7, 1949, found that Criche had developed a rash on both hands from "working in diesel oil," and diagnosed his condition as "contact dermatitis." He saw Dr. Lawless in Chicago 11 times from March to June, 1950. He went to Dr. Robin for examination but not treatment on two occasions.

In July and August, 1949, he worked as a temporary foreman where he was not exposed to diesel oils and cooling fluids and the eruption cleared gradually. Back at his regular job the rash broke out again and Dr. Cobin took him out of service in January, 1950. He was out of service until March 30, 1950, losing 83 days' work. He then gave up the roundhouse job and returned to work in the back shop, where he was only occasionally exposed to oil and dirt on the wheels of the locomotives he was working on. Occasionally he was required to work in the roundhouse a day or two at a time to fill a vacancy, and on account of a reduction in force during the steel strike, he went back to the roundhouse in June, 1952, where he started to get a small rash. He was off work from August

7 to October 20, 1952, because of an accidental injury to his right hand. He then returned to the back shop job. He lost approximately 199 days from his work, or a total salary loss of approximately $1,500. At the time of trial he had a "mild amount of dermatitis on the tops of his hands and wrists," with slight thickening of the skin and increased pigmentation. His condition was "approaching normality" and Dr. Robin had no opinion whether it was temporary or permanent.

Plaintiffs were permitted to introduce evidence as to the effects of chromate solution used in the cooling system of the diesel locomotives on their counsel's representation that at times the cooling fluid and fuel oils became mixed together as the result of leakage. There is no evidence to support the theory on which the testimony as to the chromate solution was introduced. Defendant purchased its diesel fuel oil from Standard Oil Company under specifications. For use as an inhibitor of scale formation and electrolytic action in the cooling system of its locomotives, the defendant purchased from Dearborn Chemical Company a product known as No. 517, whose formula was a trade secret, but which was about two-thirds bichromate, which was within the general range of the chromate content of similar products. Used in a ratio of 50 ounces of compound to 100 gallons of water, this produced a solution of 1 to 384, or less than 3/10ths of one percent chromate. There was no evidence that defendant's specifications for diesel fuel oil or the cooling solution differed in any respect from those commonly used by other railroads.

Prior to November, 1947, when Crowley's dermatitis first appeared, Dr. Bennett, defendant's chief surgeon, knew that chromate in powder form and petroleum in

certain concentrations caused skin irritations to some susceptible people. He had never heard of any case of a railroad employee claiming to have contracted such dermatitis. Defendant's general superintendent, Paul Verd, had worked with diesel locomotives since 1935, first in the servicing department of Electro Motive Division of General Motors, which manufactures diesel locomotives, then in successive positions with defendant in charge of diesel operations, interrupted by four and a half years' service in diesel submarine motor maintenance during World War II. He had never heard of any case of dermatitis due to diesel fuel oil until Crowley's case. It was known in 1947 that certain individuals suffered ill effects by coming in contact with solutions containing chromate. Books had been published on this subject. Dr. Cobin testified that it had been known for 22 years that certain oils would produce dermatitis. When he saw Kern and Criche he knew that they had been in contact with fuel oil. When Dr. Meadows first saw Crowley on December 22, 1947, he knew that his condition was caused from "working near diesel oil" and that this plaintiff was afflicted with contact dermatitis from fuel oil, and officially reported to Dr. Bennett on Kern on February 5, 1949, and on Criche on June 7, 1949. On December 22, 1947, Dr. Meadows issued an order that Crowley was not to work around diesel oil. Dr. Louis Schwartz, the senior author of the outstanding text on "Occupational Diseases of the Skin," and who was the organizer in 1930, and until his retirement in 1947, the head of the dermatology department of the United States Public Health Service, said that at the time of his retirement he had heard of no case of dermatitis of a railroad employee from diesel fuel oils or cooling solutions, and that so far as he knew up to that time there

had not been any case of dermatitis in the railroad industry in the use of diesel fuel oil and that he first learned of any such cases a year or two later.

Plaintiff's counsel interrogated the medical witnesses about their familiarity with certain medical publications, but none of the articles were admitted into evidence. In response to a question as to the period of time the effect of chromate had been known, Dr. Robin referred to the textbook "Occupational Diseases of the Skin" of which Dr. Schwartz was a coauthor, published in 1947, that dealt with and discussed the various industries in which chromates were used and the various reactions from exposure, and in response to a similar question as to knowledge of the effect of petroleum, he referred to the same textbook. On cross-examination he was shown a copy of the book and admitted that in the chapters on dermatitis caused by chromates and petroleum derivatives, there was no reference to those substances as used in the railroad industry. Later Dr. Schwartz testified that not until a year or two after July, 1947, did he hear of any such dermatitis cases in the railroad industry. Dr. Robin also referred to an article in the Foreign Letters Section of the Journal of the American Medical Association for October 10, 1931, dealing with skin sensitivity to chromate compounds in the printing industry, and to an article by Dr. Schwartz in the Journal of Industrial Medicine in 1942 dealing with dermatitis among operators of air conditioning equipment. On cross-examination he admitted that he did not know whether chromates were used in the printing and air conditioning industries in original powdered form or in solution, although the hazard and reaction were different.

Dr. Robin also referred to an article entitled "Can Diesel Fuel Oils Cause Dermatitis" in the August 25, 1945 issue

of the Journal of The American Medical Association. This article appeared in the "Queries and Minor Notes" Section, a sort of "question box," under a caption that the answers did not represent the opinion of any official bodies. During the cross-examination of Dr. Schwartz it developed that he had written the answer to the question which had been sent in by a Dr. Stivers, and he testified that it was not then a matter of common knowledge that men coming in contact with diesel fuel oil received dermatitis from it; that the question was referred to him for reply because it was not a matter of public knowledge; and that when he answered the question he thought it related to diesel trucks, for the problem of using diesel fuel oil had not then come to his attention.

There was no evidence that any one connected with the defendant at the time had read any of these publications or that they were circulated among persons in the railroad industry. The first published article shown to have referred to dermatitis in the railroad industry was published November 17, 1951. Each of the plaintiffs had incurred his dermatitis prior to that date. In support of defendant's contention that by 1951 it had taken measures to counteract the dermatitis hazards, it points out that starting in 1949 new washroom facilities had been constructed in the roundhouse, adjacent to the diesel area; that late in 1948 or early in 1949 protective creams and ointments were made available and special detergents with a corn meal scrubber were supplied at washstands in the roundhouse and later in the new roundhouse washrooms; that early in 1950, by an article in its magazine, by posted bulletins, by safety meetings and by letters read and distributed individually to all employees in the roundhouse and machine shops, these employees were warned of the possibility of con-

tracting dermatitis and of personal hygienic measures taken to avoid contracting such dermatitis. Dr. Schwartz made a three day inspection of defendant's facilities in November, 1951, and found them in good sanitary condition, with most of its basic recommendations already in force. He also examined 26 of the 36 individuals (out of 900 employees) who had reported cases of dermatitis in the past 5 years. Of these, 13 had no skin lesions at the time, 7 had nonoccupational diseases and 6 had active dermatitis of probable occupational origin, none severe enough to be disabled. He did not examine any of the plaintiffs.

These preventive measures were the result of investigation of the practices of other industries by both the operating and medical departments of the defendant following Crowley's initial outbreak of dermatitis. Prior to that time there were washroom facilities with individual wash basins, shower stalls and toilets available in the main shops, immediately adjacent to the "old roundhouse" where most of the roundhouse employees kept their clothes and equipment. In the roundhouse itself at first there was only running cold water. Late in 1949 both hot and cold running water were made available there. Outside the section of the roundhouse where plaintiffs worked, about 50 feet away, was a washroom with hot and cold water, washstands and showers. There was a conflict in the evidence as to who were permitted the use of this washroom. Kern testified that the reason the roundhouse employees did not like to use that washroom was that it was also used by yard and other employees, whom Criche referred to as "muckers." None of the plaintiffs used the washing facilities available to them prior to the outbreak of their dermatitis. Crowley washed only at the noon hour. Kern did not wash with soap and water, but used kerosene and

waste to clean his hands, a practice which Dr. Schwartz testified was more likely to cause dermatitis than any other. Criche used kerosene and oil to clean his hands, but he never washed himself at work. After the protective creams and ointment and the detergent and scrubbing agent were supplied, Crowley used the protective creams only two days, and used the detergent but not the scrubber. Kern used the protective creams only half a dozen times and he never used the corn meal scrubber. Criche has never used these preventatives.

Dr. Cobin, defendant's dermatologist, testified that it had been known for 22 years that certain oils would produce dermatitis. When he saw Kern and Criche he knew they had been in contact with fuel oil. Dr. Meadows diagnosed the cases as contact dermatitis from fuel oil. It was not until January, 1950, that the defendant took preventive steps to publicize the danger from working with diesel fuel oil. Dr. Bennett testified that since 1927 it was known that petroleum in certain concentrations could cause skin eruptions. He knew prior to 1947 that rubber gloves were proper prophylactics for exposure to fuel oils. Dr. Schwartz and others had written a book in 1939 containing a discussion on "Petroleum Dermatitis." It was known for many years and publicized by pamphlets issued by the United States Health Service that "petroleum was a hazard as a cause of dermatitis." Dr. Schwartz testified that in 1942 he knew that petroleum and its derivatives were a cause of dermatitis; that he had known that since 1930; that he had compiled or prepared publications printed by the United States Government with protective measures "involving exposure to petroleum and its derivatives"; and that he had published the first of these in 1930 and in all there were 6 to 12 of such documents. At least 6 of such

pamphlets written by Dr. Schwartz were published by the government in medical journals and in trade journals. In Dr. Schwartz's book, published in 1939, he wrote about "the hazard of exposure to petroleum oil and its derivatives in so far as dermatitis is concerned." Crowley testified that when he returned to work in February, 1948, there were no bulletins posted with reference to the use of diesel oil, nor were ointments or protective creams furnished to him. While the defendant urged cleanliness as an effective preventative against contact dermatitis from fuel oil, there were no washing facilities in the roundhouse prior to June, 1949. Wash basins and showers were not installed until May, 1950.

In *Urie* v. *Thompson,* 337 U. S. 163, the United States Supreme Court held that an occupational hazard was an injury within the meaning of the Federal Employers' Liability Act. One of the points raised in that case was whether the trustee of the railroad knew or, by the exercise of ordinary care, should have known of the danger of silicosis arising from the conditions of employment. The court said that the act does not define negligence, leaving that question to be determined by the common law principles as established and applied in the federal courts; that the ruling in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, has no application; that what constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes; and that federal decisional law formulating and applying the concept governs. The court quoted with approval from *Sadowski* v. *Long Island R. Co.,* 292 N. Y. 448, 456, the statement that "ordinary care must be in proportion to the danger to be avoided and the

consequences that might reasonably be anticipated from the neglect." In the *Urie* case the court said further (186):

> "In our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning."

The question presented by defendant's motion for judgment notwithstanding the verdict is whether there is any evidence fairly tending to prove the cause of action. The court accepts as true, evidence in favor of the plaintiff and gives him the benefit of all favorable inferences that might reasonably be drawn therefrom. *Halloran* v. *Chicago & N. W. Ry. Co.*, 327 Ill. App. 217, (Abst.); *O'Neal* v. *Caffarello*, 303 Ill. App. 574. In *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, the Federal Supreme Court said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them, citing *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 354. In *Lavender Adm.* v. *Kurn et al.*, 327 U. S. 645, the court said (653): "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." In *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, the court said (653):

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. • • • Whether those standards are satisfied is a federal question, the rights created being federal rights. • • •

> The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The question at issue in this case was recently decided by the Second Circuit of the United States Court of Appeals in *Young* v. *Pennsylvania R. Co.*, 197 F. (2d) 727. There, an action by a dining car waiter to recover damages for a contact dermatitis on his hands and arms alleged to have been caused by the use of three well-known products supplied by his employer for cleaning and sterilizing the dining car equipment, resulted in a verdict in plaintiff's favor for $3,500. Under Rule 50 (b) of the Federal Rules of Civil Procedure the verdict was set aside and judgment entered in favor of the defendant. Plaintiff's medical evidence showed that these three products were irritants, and if used for a prolonged period would produce dermatitis. The Court of Appeals, in reversing the judgment and reinstating the verdict, said (727):

> "From the evidence the jury could find that the plaintiff was exposed to the harmful effects of the above named irritants for long periods of time and that such exposure caused his injury. On the subject of negligence the jury was instructed that for the plaintiff to recover they must find that the use of the three cleansing agents created a risk of injury to the plaintiff which a reasonable person would have guarded against, and that the defendant did not take such measures to guard against that risk as would have been taken by a reasonably prudent man. Although there was no evidence that any other employee of the defendant had ever been similarly affected and representatives of the manufacturers of the cleaning products testified that they were widely used for the same purposes for which the defendant used them and no such injury had ever occurred so far as they knew, we think a jury question was pre-

> sented. The plaintiff testified that he visited the defendant's medical department at various times when the rash showed on his hands and the defendant's response to interrogatories acknowledged that the medical examiner of the railroad knew that the plaintiff claimed to be suffering from a dermatitis of undetermined cause. Although the proof was far from strong, we think it was error to set aside the verdict."

Defendant calls our attention to the fact that this was a *per curiam* opinion, one judge dissenting, and argues that the opinion is neither controlling nor persuasive. Defendant also calls attention to the rule that only decisions of the Federal Supreme Court are controlling under the federal statutes, citing *Lewis* v. *Braun,* 356 Ill. 467; *Kenna* v. *Calumet, Hammond & Southeastern R. Co.,* 206 Ill. App. 17, 26. Defendant exhibits as an appendix to its reply brief the briefs of both parties in the *Young* case and states that from the briefs it is apparent that the presentation was most inadequate. We observe that it was maintained that it "cannot be held that the furnishing of these products to the plaintiff for use by him in his work constituted negligence on the defendant's part unless the Railroad can be charged with notice that one or more of these products was likely to cause injury to the plaintiff or to someone doing the same or similar work," and that "there is no evidence on which to predicate such notice." In that brief counsel for the railroad, calling attention to the rule that liability arises from negligence and not from injury, said that the record of the case "is completely void of any evidence that any other dining car employee of the defendant, or for that matter, anyone else ever incurred contact dermatitis" through the use of the polish or other solutions used by the plaintiff. In our opinion the briefs in the *Young* case adequately presented the question before us.

In *Baumgartner* v. *Pennsylvania R. Co.*, 292 Pa. 106, 140 A. 622, a Federal Employers' Liability Act case, the court sustained a verdict for the plaintiff. In that case it was alleged that the decedent met his death by being fatally poisoned by monoxide gas arising from hot ashes in a pit from which the decedent was required to shovel the ashes. The court said (110):

> "* * * and the master is presumed to know the nature and qualities of the materials he places in the hands of his servants. In other words, he is presumed to have such knowledge of matters pertaining to his business as is possessed by those having special acquaintance with the subjects involved. * * * An employer is presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged."

In *Harvey* v. *Welch*, 86 N. H. 72, 163 A. 417, an action to recover damages for injuries sustained by plaintiff in using an oxalic acid solution in cleaning automobile radiators, the court said (73):

> "The argument that the defendant had no actual knowledge as to the physiological effect of oxalic acid fumes, if well founded in fact, is not effective in law to absolve him from liability. Being under a positive duty to exercise care for the safety of his servant, he was bound to make reasonable inquiry for the purpose of informing himself of the natural consequences of using the material which he furnished. A master 'must take into account the properties of such substances as he employs for the purposes of his business and the operation of familiar physical laws upon these substances.' "

In the instant case the jury was instructed that the burden was upon each of the plaintiffs to prove by a preponderance of the evidence that prior to the time he contracted his dermatitis the defendant had actual knowledge of or, in the exercise of reasonable care, would have known

that the plaintiff or any other employee similarly employed, was reasonably likely to contract a dermatitis from such contact that he might reasonably be expected to have with the oils used on or about the diesel locomotives. In our opinion, whether the defendant could or might have known of the dangers to the plaintiffs from the exposure to the diesel oils and chromates, was a question of fact for the jury. We have come to this determination after a careful reading of the transcript of the evidence, the briefs and the cases dealing with the proposition. It is significant that when Dr. Meadows first saw Crowley on December 22, 1947, he diagnosed his condition as contact dermatitis from diesel oils. He made a similar diagnosis as to Kern and Criche. There is evidence that defendant could or might have known that repeated or continual contact with diesel fuel and lubricating oils and with chromate solutions would cause dermatitis. There is evidence that notwithstanding this knowledge the defendant took no preventive measures until after plaintiffs had contracted dermatitis. We are of the opinion that the court was right in overruling defendant's motions for judgment notwithstanding the verdict.

Defendant argues that the court erred in admitting the medical reports made out by Dr. Meadows and transmitted to Dr. Bennett because they are hearsay and therefore incompetent and inadmissible. The reports were offered to prove that the defendant knew, through its own doctors, that diesel fuel oil caused the dermatitis with which plaintiffs were afflicted. These reports were properly received in evidence as admissions again interest. Defendant asserts that the court erred in permitting questions concerning medical publications on dermatitis. Plaintiffs' counsel questioned the medical witnesses as to whether they were familiar with certain medical publica-

tions. There was no attempt made to show that any of the publications mentioned were in general circulation and usage. In *Ullrich* v. *Chicago City Ry. Co.*, 265 Ill. 338, the court said (341):

> "The law is well settled in this State that scientific books may not be admitted in evidence before a jury, and that such books cannot be read from to contradict an expert witness except where such expert assumes to base his opinion upon the work of a particular author, in which case that work may be read in evidence to contradict him."

We are of the opinion that the court erred in permitting questions concerning medical publications on dermatitis. Inasmuch as there is strong support in the record for the verdicts on the question of liability, we do not believe that the judgments should be reversed and the cause remanded for the error. Under all the circumstances we do not think that defendant was harmed by the admission of the evidence.

Finally, defendant urges that the verdicts are so excessive as to require a new trial in the interest of justice. We agree that the verdicts are excessive. Crowley lost only 46 days from work before he insisted upon returning to work in the roundhouse against the advice of all the doctors he had seen up to that time. His wage loss to that date was $575. He was warned that if he insisted upon his right to return to work in the roundhouse he did so not at the direction or insistence of defendant, but of his own accord. On February 19, 1948, he returned to the job in the roundhouse, which he knew was the cause of his condition and persisted in working there despite the fact that there have been vacancies in the back shop upon which he could have bid successfully by virtue of his seniority. The folly of his course of conduct is made clear by contrasting his case with those of Kern and Criche.

They transferred to jobs in the back shop. Kern, after transferring, lost only 13 days from work on account of his dermatitis in 2½ years. At the time of the trial Kern's and Criche's dermatitis was mild and in the opinion of Dr. Robin was not permanent and was curable. As the result of continuing to work in the roundhouse and failing to follow the preventive measures directed by the defendant, Crowley lost an additional 250 days or more from work on account of his dermatitis and in the opinion of Dr. Robin, because of the length of time and the frequency of exposure, his condition is now permanent. Crowley's wage loss was somewhere between $4,000 and $5,000. His only out-of-pocket expense was about $200. Section 53, 45 U S C A, provides that the fact that an employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. We are satisfied that when Crowley knowingly remained in contact with the source of his occupational disease and failed to use the means provided for protection against the hazards, he was guilty of contributory negligence as a matter of law. The record does not support a verdict for $42,800. Therefore, the judgment of the Superior Court of Cook County is affirmed as to John Crowley on the filing of a remittitur by him in the sum of $22,800 in the office of the clerk of this court within 10 days; otherwise, the judgment as to that plaintiff is reversed and the cause remanded to the Superior Court for further proceedings consonant with this opinion.

Following the initial outbreak of his dermatitis, Kern lost 90 days from work. Later he lost 13 more days. His total wage loss on account of his dermatitis is approximately $1,500. Criche lost 83 days from work following the initial outbreak of his dermatitis. His subsequent wage

loss, including the time lost on account of an accidental injury to his right hand, was about 50 days. His entire wage loss is approximately $2,000. Dr. Robin, testifying for plaintiffs, had no opinion whether Kern's condition which was "fairly mild at the time of trial," or Criche's condition which was "approaching normality," was permanent or not. He thought that if they would each avoid further contact with the irritating substances, their condition might be entirely cured. Under the testimony there can be no award of damages for either of these men on the theory of permanency of their injuries. There was no evidence of any monetary loss to either Kern or Criche other than their wage loss. We think that the verdicts of $28,900 and $19,500 in favor of these two plaintiffs are excessive. The verdicts in favor of Crowley and Criche were more than ten times their monetary damages and Kern's was more than twenty times his loss. The judgment of the Superior Court of Cook County is affirmed as to Charles Kern on the filing of a remittitur by him in the sum of $18,900 in the office of the clerk of this court within 10 days; otherwise, the judgment as to him is reversed and the cause remanded with directions to proceed in a manner consonant with the views expressed. The judgment of the Superior Court of Cook County is affirmed as to Richard T. Criche on the filing of a remittitur in the sum of $9,500 in the office of the clerk of this court within 10 days; otherwise, the judgment is reversed and the cause remanded with directions to proceed in a manner consonant with the views expressed in this opinion.

JUDGMENTS AFFIRMED WITH
REMITTITURS:
OTHERWISE, JUDGMENTS REVERSED
AND CAUSES REMANDED WITH DIRECTIONS.

NIEMEYER, P. J., and FRIEND, J., Concur.

JUDGMENT OF THE APPELLATE COURT

1. Order of March 8, 1954:

On the 8th day of March, A. D. 1954, it being one of the days of the February Term A. D. 1954, the following order was entered of record in said cause, to-wit:

John Crowley, Charles Kern and Richard T. Criche, Appellees No. 46096 vs. Elgin, Joliet and Eastern Railway Company, a corporation, Appellants	Appeal from the Superior Court of Cook County.

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment relating to John Crowley, certain Appellee in said cause, there is manifest error insofar as said judgment exceeds in the amount the sum of Twenty Thousand Dollars ($20,000.00).

Therefore, it is considered by the Court that upon the said John Crowley, certain Appellee, executing and filing in said cause within 10 days from this date a remittitur in the sum of Twenty-Two Thousand Eight Hundred Dollars ($22,800.00), that said judgment relating to John Crowley be affirmed as to the remainder, namely, the sum of Twenty Thousand Dollars ($20,000.00), otherwise that said judgment be reversed and cause remanded with directions.

And the Court being also of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment relating to Charles Kern, Certain Appellee in said cause, there is manifest error insofar as said judgment exceeds in the amount the sum of Ten Thousand Dollars ($10,000.00).

Therefore, it is considered by the Court that upon the said Charles Kern, certain Appellee, executing and filing in said cause within 10 days from this date a remittitur in the sum of Eighteen Thousand Nine Hundred Dollars ($18,900), that said judgment relating to Charles Kern be Affirmed as to the remainder, namely the sum of Ten Thousand Dollars ($10,000.00), otherwise that said judgment be reversed and cause remanded with directions.

And the Court being also of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment relating to Richard T. Criche, certain Appellee in said cause, there is manifest error insofar as said judgment exceeds in the amount the sum of Ten Thousand Dollars ($10,000.00).

Therefore it is considered by the Court that upon the said Richard T. Criche, certain Appellee, executing and filing in said cause within 10 days from this date a remittitur in the sum of Nine Thousand Five Hundred Dollars ($9,500.00) that said judgment relating to Richard T. Criche be affirmed as to the remainder, namely the sum of Ten Thousand Dollars ($10,000.00), otherwise that said judgment be reversed and cause remanded with directions.

2. Order of March 15, 1954:

And afterwards on the 15th day of March A. D. 1954, the following order was entered of record in said cause, to-wit:

John Crowley, Charles Kern and Richard T. Criche, Appellees No. 46096 vs. Elgin, Joliet and Eastern Railway Company, a corporation, Appellants	Appeal from the Superior Court of Cook County.

On this day came again the said parties, and the said John Crowley, Certain Appellee, having remitted the sum of Twenty-Two Thousand Eight Hundred Dollars ($22,800.00) from the amount of the judgment heretofore entered in his behalf in the Superior Court of Cook County; And the said Charles Kern, Certain Appellee, having remitted the sum of Eighteen Thousand Nine Hundred Dollars ($18,900.00) from the amount of the judgment heretofore entered in his behalf in the Superior Court of Cook County; And the said Richard T. Criche, Certain Appellee, having remitted the sum of Nine Thousand Five Hundred Dollars ($9,500.00) from the amount of the judgment heretofore entered in his behalf in the Superior Court of Cook County, in accordance with the opinion of this Court heretofore filed in said cause:

Therefore, it is considered by the Court that the judgment of the Superior Court of Cook County, rendered in behalf of John Crowley, Certain Appellee, be Affirmed as to the remainder, namely the sum of Twenty Thousand Dollars ($20,000.00), and stand in full force and effect as to that amount, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the Court that the judgment of the Superior Court of Cook County, rendered in behalf of Charles Kern, Certain Appellee, be Affirmed as to the remainder, namely the sum of Ten Thousand Dollars ($10,000.00), and stand in full force and effect as to that amount notwithstanding the said matters and things therein assigned for error.

And it is further considered by the Court that the judgment of the Superior Court of Cook County, rendered in behalf of Richard T. Criche, Certain Appellee, be Affirmed as to the remainder, namely the sum of Ten Thousand Dollars ($10,000.00), and stand in full force and effect as to that amount, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the Court that the said Appellees recover of and from the said Appellant, their costs by them in this behalf expended, to be taxed, and that they have execution therefor.

3. Order denying leave to appeal:

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the *thirteenth* day of *September* in the year of our Lord, one thousand nine hundred and *fifty-four*, within and for the State of Illinois.

Present: George W. Bristow, Chief Justice; Justice William J. Fulton; Justice Walter V. Schaefer; Justice Harry B. Hershey; Justice Joseph E. Daily; Justice Ralph L. Maxwell; Justice Ray I. Klingbiel; Latham Castle, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

Be It Remembered, that, to-wit: on the *15th* day of *September 1954*, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

John Crowley, Charles Kern and Richard T. Criche, Respondents No. 33271 vs. Elgin, Joliet & Eastern Railway Company, a corporation, Petitioner	Petition for Leave to Appeal from Appellate Court, First District, 49 S 10502 46096.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by *them* in this behalf expended, to be taxed, and that *they* have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this *30th* day of *September*, 1954.

/s/ Earle Benjamin Searcy
Clerk, Supreme Court of Illinois.

(Seal)

FILED
JAN 7 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 482

JOHN CROWLEY, CHARLES KERN and RICHARD T. CRICHE,

Respondents,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

EZRA L. D'ISA,
1 North La Salle Street,
Chicago 2, Illinois,
Attorney for Respondents.

MARION J. HANNIGAN,
LOUIS Z. GRANT,
EDWARD WOLFE,
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Argument 16

(a) Appellate Court correctly held defendant not entitled to directed verdict. 16

(b) The evidentiary facts created issues submissible to a jury 17

(c) The medical reports of defendant's surgeon were competent evidence to show notice. 21

Conclusion 24

Jurisdiction 2

Opinions of Courts below 2

Questions Presented 3

Statement of Facts 4

Statute Involved 3

CITATIONS.

Baumgartner v. Pennsylvania R. Co., 292 Pa. 106, 140 A. 622 18

Beringer v. Lackner, 331 Ill. App. 591 23

Crowley v. Elgin, Joliet & Eastern Ry. Co., 1 Ill. App. 2d 481, 117 N. E. 2d 943..... 2

Ellis v. Union Pacific R. Co., 329 U. S. 649, 653..... 16

Evinger v. Thompson, (Mo. 1954), 265 S.W. 2d 726..., 17

Great Atlantic & Pac. T. Co. v. Supermarket Eqpt. Co., 340 U.S. 147, 153-154, 71 S. St. 127..... 3

Harvey v. Welsch, 86 N.H. 72, 163 A 417..... 18

Herb v. Pitcairn, 324 U.S. 117, 65 S. Ct. 459..... 3

Just v. Chambers, 312 U.S. 383, 385, 61 S. Ct. 687..... 3

PAGE

Kelly v. Retirement Board, 292 Ill. App. 390, 11 N.E. 2d 220, 222 2

Mabee v. Sutliff & Case Co., 404 Ill. 27, 32, 88 N.E. 2d 12, 15 2

McArthur v. U. S., 315 U.S. 787, 62 S. Ct. 915 2

Milk Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552 3

Page v. Arkansas Nat. Gas. Corp., 286 U.S. 269, 52 S. Ct. 507 3

Peterson v. Midwest Transfer Co., 344 Ill. App. 167.... 23

Schikora v. Freeport Motor Casualty Co., 320 Ill. App. 359, 51 N.E. 2d 75 22

U. S. v. Johnson, 268 U.S. 220, 45 S. Ct. 496..... 3

Urie v. Thompson, 337 U.S. 163 4

Zucht v. King, 260 U. S. 174, 176-177 2

STATUTES INVOLVED.

28 U.S.C.A. 1257(3) 2

45 U.S.C.A. 51 ..... 2, 3

Ill. Rev. Stats., Chap. 110, Pars. 199, 259.32 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 482

JOHN CROWLEY, CHARLES KERN and RICHARD T. CRICHE,

Respondents,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

Now come the respondents, John Crowley, Charles Kern and Richard T. Criche, (plaintiffs and appellees in the Illinois courts), and by and through Ezra L. D'Isa, their attorney and file, this their brief in opposition to the petition for the writ of certiorari prayed for herein by the petitioner, Elgin, Joliet and Eastern Railway Company, (defendant and appellant in the Illinois courts), and says:

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Appellate Court of the First District of Illinois (included in petrs. pet., pp. 29-52), is officially reported as *Crowley* v. *Elgin, Joliet and Eastern Ry. Co.*, 1 Ill. App. 2d 481, 117 N.E. 2d 843. No other reported opinions were filed in the case. The Supreme Court of the State of Illinois denied[1] application of petitioner for leave to appeal[2] to that Court from the Appellate Court.

II.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Court on the ground that the construction of Federal Statute is involved; (28 U.S.C.A. 1257(3))—the statute being the Federal Employers' Liability Act. (45 U.S.C.A. 51). The theory upon which petitioner seeks certiorari in this Court does not raise a Federal question of substance,[3] but only a factual question of whether the defendant in the exericse of reasonable care should have anticipated that constant contact by its employees, with diesel fuel oils and sodium bichromates, could or might

---

[1] The legal effect of that denial was an approval of the conclusion reached by the Appellate Court. (**Kelly v. Retirement Board**, 292 Ill. App. 390, 11 N.E. 2d 220, 222).

[2] The Illinois Supreme Court in cases of this character, in its discretion, reviews judgments of the Appellate Court on questions of law only. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15), by petitions for leave to appeal from the Appellate Court to the Supreme Court, (Ill. Rev. Stats. 1949, Ch. 110, Pars. 199 and 259.32). The facts as found by the Appellate Court are ordinarily conclusive on the Illinois Supreme Court. (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32, 88 N.E. 2d 12, 15).

[3] This Court has said that before it will grant certiorari, the petition must show that a substantial federal question is involved. (**McArthur v. U. S.**, 315 U. S. 787, 62 S. Ct. 915; **Zucht v. King**, 260 U. S. 174, 176-177)

cause dermatitis—a question which this Court will not ordinarily re-examine.[1] This Court has said that its power over state judgments, "is to correct them to the extent they incorrectly adjudicate federal rights."[2] We submit the opinion of the Appellate Court demonstrates that court did not infringe upon any federal right by affirming the judgments in favor of respondents.

III.

THE QUESTIONS PRESENTED.

The petitioner admits that the only real issue in the case was the question of whether the defendant in the exercise of reasonable care should have anticipated that its employees, required by their work to come into contact with diesel fuel oil and bichromates, might or would develop dermatitis. As we suggested under a prior heading, this issue was purely factual; that the Appellate Court did not err in holding that there was ample evidence to carry that issue to the jury.

IV.

THE STATUTE INVOLVED.

As petitioner suggests, the only statute involved is Section 51 of the Federal Employers' Liability Act. (45 U.S.C.A. 51.) And while this case involves an occupational hazard, in counter-distinction to actual physical

---

[1] **Just v. Chambers, 312 U. S. 383, 385, 61 S. Ct. 687; Milk Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552; Great Atlantic & Pac. T. Co. v. Supermarket Eqpt. Co., 340 U. S. 147, 153-154, 71 S. Ct. 127. And see also, Page v. Arkansas Nat. Gas Corp., 286 U. S. 269, 52 S. Ct. 507; U. S. v. Johnson, 268 U. S. 220, 45 S. Ct. 496, where this Court held in substance that it would not review on certiorari, fact questions found in respondent's favor by both courts below.**

[2] **Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459.**

injury, this Court has held disability arising from such hazard is an "injury" within the meaning of the provisions of the Act.[3]

V.

RE-STATEMENT OF THE FACTS MATERIAL TO THE ISSUES PRESENTED.

Many of the facts stated by the petitioner, (hereinafter called "defendant") under its Statement of the Case (pet. p. 3) are either inadequately or misleadingly stated. Therefore, the respondents (hereinafter called "plaintiffs"), to enable this Court to properly evaluate the merit of defendant's contentions, have restated the material facts:

(a)

The evidence demonstrates the defendant knew or should have known the harmful effects of diesel fuel oil and bichromates, and should have taken adequate steps to protect its employees required to come into contact with such substances.

The evidentiary history of the work, and the conditions under which each of the plaintiffs developed dermatitis, demonstrates that the defendant, in the exercise of reasonable care, knew or should have known of the harmful effects of requiring its employees to work in diesel fuel oil, lubricating oils, and sodium bichromates, without taking proper precautions to protect them from the dangers of contact with such substances.

---

[3] **Urie v. Thompson, 337 U. S. 163.**

(1)

The plaintiffs, their work and the manner in which they become disabled from contact dematitis.

(i)

John Crowley.

Mr. Crowley was 61 years of age (Abst. 44).[1] He was classified as a general machinist (Abst. 44), with 30 years of service with the defendant (Abst. 51). Between the years of 1920 and 1947 he did general repair work in the "back shop" (Abst. 55) at Joliet, Illinois, (Abst. 44) on steam locomotives (Abst. 44). In 1936, the defendant began to replace its steam locomotives by the use of diesel locomotives (Abst. 127-128). There was a complete change-over from steam locomotives to diesels as a motive power about the end of 1948 (Abst. 129; Add'l Abst. 23; Abst. 78; Abst. 92). It was because of this change-over in motive power that Crowley was assigned to work on diesels at the roundhouse in February 1947 (Abst. 44).

Prior to February, 1947, Crowley had no contact with diesel fuel oil (Abst. 44). He was in good health (Abst. 45). Crowley had an Eighth Grade education (Abst. 44). He had not been instructed by the defendant as to the possible ill-effects of coming in contact with this oil (Abst. 44-45). No orders, written or otherwise were received by him on this subject from his superiors (Abst. 45).

Prior to October, 1947 (when he first became afflicted with dermatitis; Abst. 47) he had no skin affliction of any kind (Abst. 44). When Crowley was assigned to work on diesels in the roundhouse at East Joliet, there were no

[1] Since we have not been served with a copy of the record filed in this Court, record references will be made to the Abstract of Records filed in the Appellate Court.

facilities in that roundhouse for the men to take shower baths, nor was any wash basin provided for the men to wash (Abst. 45). The only water available between February and November of 1947 was cold cloudy water from a pipe coming through the floor which drained into a funnel-shaped drain (Abst. 45). Crowley was not furnished with oilproof garments or protective ointments or soaps of any kind (Abst. 45; Abst. 70; Abst. 51; Add'l Abst. 22).

In the performance of his work for the defendant, he was required (1) to change lube and fuel oil fillers (Abst. 46); (2) to inspect engine bearings (Abst. 46; Add'l Abst. 13). In this work, his hands would come into constant contact with diesel and lube oils (Abst. 46; Abst. 48), as well as into contact with other parts of his body (Abst. 47-48). He came into contact with these oils every working day from February 1947 to November, 1947, when he first developed a rash on his hands, and on his arms as far as his elbows (Abst. 47). He first saw his own family physician in Joliet on November 20 or 21, 1947 (Abst. 48). When his condition did not improve, he asked his foreman to send him to the hospital. He was then sent to the Silver Cross Hospital in Joliet, and there saw Dr. Meadows, (the local surgeon for the defendant, (Abst. 34; Add'l Abst. 11; Abst. 17) on December 22, 1947 (Abst. 48). Dr. Meadows diagnosed his condition as contact dermatitis from diesel oil (Abst. 34-35). He continued to treat him (Abst. 49; Add'l Abst. 13) until after January, 1948 (Abst. 48). When his condition failed to improve he sent Crowley to the Northwestern University Clinic in Chicago on January 2, 1948 (Abst. 48-49). When Dr. Meadows first saw Crowley on December 22, 1947, he made an official report to the defendant's chief surgeon

R. J. Bennett, in Chicago (Abst. 33) on the forms provided by the defendant (Abst. 34). In that official report he found Crowley's condition was caused by "working near diesel oil" and made a diagnosis of Crowley's malady as "contact dermatitis from diesel oil" (Abst. 34-35; Plaintiff's Exhibit No. 5).

On December 22, 1947, at the request of Dr. Meadows, Crowley was transferred back to work on steam engines (Abst. 51-52), where he worked until February, 1948, when he was again transferred back to the roundhouse and placed at work on diesel locomotives (Abst. 52; Add'l Abst. 16).

Crowley described his physical condition resulting from this dermatitis (Abst. 48-49), the treatment he received for this condition (Abst. 48-49; Abst. 50) and his present condition (Abst. 50-51; Add'l Abst. 15; Add'l Abst. 22). Dr. Robin saw him on April 14, 1949 and described his condition then. (Add'l Abst. 30; Abst. 100-103; Add'l Abst. 31); and at the time of the trial (Abst. 102), photographs of Crowley appear in the record (Abst. 50, Plaintiff's (Crowley's) Exhibits Nos. 8 & 9) His hands and arms were exhibited to the jury (Abst. 50).

Dr. Robin was of the opinion Crowley's condition was permanent (Abst. 103). The defendant offered no evidence to the contrary although its doctors had treated him. However, the testimony of defendant's expert, Dr. Schwartz, in effect, confirms this finding, since he says it is doubtful if dermatitis of long standing, by a person over 60 years of age, can be cured (Abst. 121-122).

Crowley lost approximately 329 days from his work on account of this condition from December, 1947 to September, 1952 (Abst. 53-54, Plaintiff's Exhibits No. 10-

10A). His rate of pay prior to 1947 was $12.50 per day (Abst. 45). Now it is $16.58 per day (Abst. 69).

His lost time and medical expense (Abst. 55) totals approximately $5,000.00.

(ii)

Charles Kern.

Mr. Kern was a pipe fitter who was 68 years old (Abst. 72). He had worked continuously for the defendant for 37 years (Abst. 72). Prior to February 5, 1949, he was in good health and had no skin affliction (Abst. 72). He has been working on diesel locomotives since August, 1948 (Abst. 72). In connection with his work of making running repairs to diesels, he comes into constant contact with diesel fuel oil and lube oil equipment (Abst. 73).

He had never made a study of the ill effects of working in diesel oil (Abst. 73), and did not know that contact with that oil, prior to February, 1949, would affect him. No one had ever told him about the ill effects therefrom. (Abst. 73).

On February 5, 1949, he developed dermatitis on his hands, face, neck and feet (Abst. 73), having previously noticed in January of 1949 that his hands were red and had a "burning irritation." He first saw Dr. Meadows on February 5, 1949 (Add'l Abst. 7), who found at that time he had "an itch, rash, on the back of his hands and forearms." On Dr. Meadows' orders he was hospitalized for two weeks (Abst. 23; Abst. 74).

Kern described the condition when he went to see Dr. Meadows. (Abst. 74)

Dr. Meadows treated him for a time (Abst. 23) and when he apparently did not improve, sent him to the

defendant's dermatologist, Dr. Cobin (Abst. 30-31). Dr. Meadows made an official report of the results of his examination of Mr. Kern to the defendant's chief surgeon, Dr. Bennett, in which he found the cause of Kern's condition as follows: (Abst. 36; Plaintiff's Exhibit No. 6) "Working in diesel oil developed rash on hands," and made a diagnosis of "contact dermatitis of hands and forearms." (Abst. 37)

Dr. Cobin first saw Kern on March 24, 1949, and described his condition and what he did for him (Abst. 25-26; Abst. 27).

Kern was also examined and treated by Dr. Robin (Abst. 103) who described his findings at that time (Abst. 103-104). He examined him again just prior to the trial and again stated his findings at that time. (Abst. 104-105)

Kern's salary in 1949 was $12.00 per day (Abst. 74). His scale at the present time is $18.40 per day (Abst. 78). Kern described his present condition of his spine, face and neck as "itchy" and said that "since 1949 the condition of my skin has changed very little. It bothers me very bad and the irritation is still severe" (Abst. 75-76; Add'l Abst. 22-23). His arms and hands were exhibited to the jury (Abst. 75).

He lost a total of 118 days from his work (Abst. 76-77) making his salary loss during that period of time approximately $2,500.00.

(iii)

Richard T. Criche.

Mr. Criche is a machinist and has been employed by the defendant at Joliet for 32 years (Abst. 86). He is 52 years old (Abst. 86).

Prior to June 7, 1949, he was employed in the roundhouse where he was engaged in making running repairs on steam locomotives (Abst. 86-87).

In the early part of 1948 he was assigned to work on diesel locomotives, exclusively, (Abst. 87). In connection with his work on these engines, carrying out his assigned duties, his hands would become saturated with fuel oil and it would sometime get on his face and clothes (Abst. 87).

Prior to commencing work on the diesel locomotives he did not know anything about danger from fuel and lubricating oils. No one had ever given him any instructions about the danger of exposure to those oils at the E. J. & E. He had only an 8th grade education and had never had any special training in this connection (Abst. 87).

The defendant did not furnish him with protective ointments, soaps, scrubing fluids, gloves, work clothes, or other protective devices prior to June 1949 (Abst. 91).

In June of 1949 his skin developed a burning and "itchy" sensation and had little water blisters. He saw his foreman who sent him to Dr. Meadows (Abst. 88), where he was treated (Abst. 23). He was then referred to Dr. Cobin (Abst. 88) who commenced to treat him on July 7, 1949. He remained under the care of this doctor until June 28, 1951. Dr. Cobin diagnosed his ailment as "contact dermatitis". (Abst. 26).

This plaintiff's condition was described by himself (Abst. 88; Add'l Abst. 26-27), by Dr. Meadows (Abst. 23), by Dr. Cobin (Abst. 27-28), and by Dr. Robin, who first saw him on February 13, 1950 (Abst. 105). His present condition was also described (Add'l Abst. 27).

Dr. Meadows in his official report to Dr. Bennett, dated June 7, 1949, found Mr. Criche had developed a rash on both hands from "working in diesel oil" and diagnosed his condition as "contact dermatitis" (Abst. 32-38, Plf's. Ex. No. 7).

This plaintiff described his present condition (Abst. 89) as did Dr. Robin who examined him again on the day of the trial (Abst. 105).

Criche's salary was $12.00 a day (Add'l Abst. 26; Abst. 88). He lost approximately 199 days from his work (Abst. 88-91) of a total salary loss of approximately $1,500.00.

(2)

Notice.

The defendant had or could have had notice of the probable ill effects of requiring its employees to work in diesel fuel oils, and chromate solutions.

Dr. Cobin (defendant's own dermatologist) testified that it had been known for 22 wears that certain oils would produce dermatitis (Add'l Abst. 10, Abst. 28).

When Dr. Cobin saw Mr. Kern on March 24, 1949, (Abst. 25) and Mr. Criche on July 7, 1949 (Abst. 26) he knew they had been in contact with fuel oil (Add'l. Abst. 10).

Dr. Meadows, when he first saw Mr. Crowley on December 22, 1947, found that his condition was caused from "working near diesel oil" and made an "objective findings (diagnosis)" that this plaintiff was afflicted with "contact dermatitis from fuel oil" (Abst. 34-35, Plf's. Ex. No. 5). Dr. Meadows also made the same findings and so officially reported to Dr. Bennett on Mr. Kern

on February 5, 1949 (Abst. 36-37, Plf's. Ex. No. 6) and on Mr. Criche on June 7, 1949, (Abst. 37-38, Plf's. Ex. No. 7). On December 22, 1947, Dr. Meadows issued an order that Mr. Crowley was not ' work around diesel oil (Abst. 139, Deft's. Ex. No. 1).

It was not until January of 1950 that the defendant took affirmative steps to publicize the danger from working in diesel fuel oil. Letters were issued to the plaintiffs, on or about January 30, 1950, advising them of the danger of contact with diesel fuel oils (see Deft's. Ex. No. 4, Abst. 33; See also Plf's. Ex. No. 1, Add'l. Abst. 3), and by posting bulletins containing the same information as contained in these letters (Abst. 81; Plf's. Ex. No. 12). In the March 1950 issue Dr. Bennett wrote an article for the defendant's Magazine "Milepost" containing this same information (Abst. 30, Rec. 193A, Plf's. Ex. No. 3).

Dr. Bennett testified that since 1927 it was known that petroleum in certain concentrations could cause skin irritations (Add'l. Abst. 11; Abst. 32-33).

Dr. Bennett knew prior to 1947, that rubber gloves were proper prophylactics for exposure to fuel oils (Add'l. Abst. 12).

Defendant's own witness, Dr. Schwartz, testified that in 1942 he knew that petroleum and its derivatives were a cause of dermatitis; that he had known that since 1930. In Dr. Schwartz's book, published in 1939, he wrote about "the hazard of exposure to petroleum oil and its derivatives insofar as dermatitis is concerned". (Abst. 124).

The defendant said that prior to 1947, soaps and corn meal scrubbers were made available, but not for a specific purpose (Abst. 41). None were furnished by the defendant for the roundhouse.

Mr. Crowley testified that when he returned to work in February, 1948, there were no bulletins posted with reference to the use of diesel oil (Abst. 68), nor was any ointments or protective creams furnished to him (Abst. 85).

While the defendant urged cleanliness as an effective preventative against contact dermatitis from fuel oil (See bulletin—Plf's Ex. No. 12, Abst. 81), there were no washing facilities in the roundhouse prior to June 1949. Wash basins and showers were not installed there until May 1950 (Abst. 91).

It is also significant to note that plaintiff's exhibit No. 5,[1] (Abst. 34) was a report of plaintiff Crowley's condition, from Dr. Meadows, defendant's "local surgeon" at Joliet, Illinois, (Abst. 35, Abst. 17) on the forms of the defendant furnished by it to Dr. Meadows (Abst. 34) to defendant's chief surgeon, Dr. R. J. Bennett at Chicago, Illinois. In this report Dr. Meadows reported to Dr. Bennett the result of his examination of the plaintiff, John Crowley on December 27, 1947. (Abst. 34). This report shows the following:

> "E. J. & E. Ry. Co. Surgical Department, Joliet Works, mine or station—Surgeon's Report.
>
> "Register No. 534, Check No. 18.
>
> "Name: John Crowley, Date December 22, 1947, 10:00 A. M.
>
> * * * * *
>
> "Etiology: Working near fuel oil.

[1] This report has been adverted to under our statement of the facts. It is here set forth because the Appellate Court was of the opinion this report was "significant" because Dr. Meadows when he first saw Crowley on December 22, 1947, "diagnosed his condition as contact dermatitis from diesel oils." (Pet. p. 49).

"Subjective Symptoms: Rash with few small pustules on both hands and arms to elbows.

"Objective Findings: (Diagnosis) Contact Dermatitis from Diesel oil."

Thus it affirmatively appears from the foregoing report, there was nothing mysterious about the malady with which Dr. Meadows found plaintiff Crowley was afflicted, the first time he examined him. The suggestion of defendant that it could not have known the nature of Crowley's affliction or its source, is thus directly contradicted by its own records.

The defendant, through various doctors employed by it, sought to cure plaintiff Crowley of dermatitis, as late as April 14, 1949, when he was seen by Dr. Robin.

Plaintiff Kern did not develop dermatitis until February 5, 1949. At that time Dr. Meadows made a formal report to Dr. Bennett, defendant's Chief Surgeon, that this plaintiff was afflicted with contact dermatitis from working near diesel oil. (Abst. 36, Pltf's. Ex. No. 6). Thus the defendant knew from plaintiff's Crowley's case, for more than a year prior to the time Kern contracted contact dermatitis that diesel oils and bichromates would cause dermatitis.

Plaintiff Criche did not develop contact dermatitis from diesel oils until June 7, 1949, when he was examined by Dr. Meadows, who then diagnosed his condition as "contact dermatitis" from "working in diesel oil" (Abst. 32-33; Pltf's. Ex. No. 7).

The only actual inquiry, therefore, is whether the defendant had notice, actual or constructive, of the dangers of dermatitis from fuel oils and sodium bichromates prior to the time Crowley contracted that malady on December 27, 1947. Certainly, by no stretch of the imagination could it be said that the defendant did not have notice of these dangers at the time Kern and Criche contracted this same malady from this same source, over a year after it had been acquired by Crowley.

VI.

ARGUMENT.

(a)

The Appellate Court correctly held that the defendant was not entitled to a directed verdict in the trial court.

The Appellate Court in discussing the question of whether the trial court correctly refused to direct a verdict for the defendant said: (pet. pp. 45-46)

> "The question presented by defendant's motion for judgment notwithstanding the verdict is whether there is any evidence fairly tending to prove the cause of action. The court accepts as true, evidence in favor of the plaintiff and gives him the benefit of all favorable inferences that might be reasonably drawn therefrom. *Halloran* v. *Chicago & N. W. Ry. Co.*, 327 Ill. App. 217 (Abst.); *O'Neal* v. *Caffarello*, 303 Ill. App. 574. In *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, the Federal Supreme Court said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them, citing *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 354. In *Lavender Adm.* v. *Kurn, et al.*, 327 U. S. 645, the court said (653): 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' "

And thereupon the Court cited and quoted from *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653. It, therefore, concluded that the trial court did not err in refusing to direct a verdict for the defendant, saying, (pet. p. 49):

> "There is evidence that defendant could or might have known that repeated or continual contact with

diesel fuel and lubricating oils and with chromate solutions would cause dermatitis. There is evidence that notwithstanding this knowledge the defendant took no preventative measures until after plaintiffs had contracted dermatitis. **We are of the opinion that the court was right in overruling defendant's motions for judgment notwithstanding the verdict.**" (Emphasis supplied)

The Appellate Court on the record before it was amply justified in reaching this conclusion, upon the facts adverted to above.

(b)

The Appellate Court correctly held the issues presented questions of fact for the jury.

The Appellate Court also refused to follow the suggestion of defendant that the decision in the *Young* case (*Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727) resulted from an inadequate presentation of the issues to the Second Circuit of the U. S. Court of Appeals (pet. p. 47). The Appellate Court expressly approved the logic of that case which held that the question of whether the railroad in the exercise of reasonable care, should have taken measures to guard against the risk presented, was "a jury question". (pet. pp. 46-47)

In addition to the *Young* case (*Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727) cited above, the Missouri Supreme Court very recently had occasion to consider this same question in *Evinger* v. *Thompson*, (Mo. 1954), 265 S. W. 2d 726. That court in its opinion, said, (p. 730):

"• • • we must hold that defendant's knowledge, actual or constructive, of the **harmful characteristics of the sodium chromate compound was a jury question.** It must be remembered that this is a Federal Employers' Liability Act case and that the question

of negligence under that Act is to be determined by common law principles as established and applied in the Federal courts. *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. The *Urie* case means that it was negligence within the meaning of the act, if defendant knew or by the exercise of due care should have known, that its standards of conduct (in the use of the compound) were inadequate to protect plaintiff and similarly situated employees. 69 S. Ct. loc. cit. 1028." (Emphasis Supplied).

The foregoing case, together with those cited by the Appellate Court in its opinion demonstrate that the judgment of that court was a correct disposition of the case in that court.

Nor is there any merit to the contention of the defendant that the cases cited by it in its petition, (pp. 23-24), hold as a matter of law that the trial court should have directed a verdict for the defendant because the defendant had no knowledge of the harmful propensities of diesel fuel oil, lubricating oils and sodium bichromates.

The Appellate Court in its opinion discussed this contention of the defendant. (pp. 48-49 of pet.), and after citing *Young* v. *Pennsylvania R. Co.*, 2 Cir., 197 F. 2d 727, (adverted to above); *Baumgartner* v. *Pennsylvania R. Co.*, 292 Pa. 106, 140 A. 622, (both Federal Employers' Liability Act cases) and *Harvey* v. *Welsch*, 86 N. H. 72, 163 A. 417), concluded by saying:

"In the instant case the jury was instructed that the burden was upon each of the plaintiffs to prove by a preponderance of the evidence that prior to the time he contracted his dermatitis the defendant had actual knowledge of or, in the exercise of reasonable care would have known that the plaintiff or any other employee similarly employed, was reasonably likely to contract a dermatitis from such contact that he might reasonably be expected to have with the oils

used on or about the diesel locomotives. In our opinion, **whether the defendant could or might have known of the dangers to the plaintiffs from the exposure to the diesel oils and chromates, was a question of fact for the jury.** We have come to this determination after a careful reading of the transcript of the evidence, the briefs and the cases dealing with the proposition." (Emphasis supplied)

We submit that the finding of the Appellate Court was in conformity with the law and the evidence.

The defendant in its petition, (pp. 23-24), cites several cases which it says sustain its contention. A résumé of these cases demonstrate they are not in point.

These cases are not Federal Employers Liability cases. *Grammer* v. *Mid-Continent Petroleum Corp.*, 10 Cir. 71 F. 2d 38, was a common law action based upon death resulting from pneumoconiosis allegedly acquired while the decedent was engaged in cleaning out petroleum stills. This case is distinguishable on many grounds. (1) Plaintiff's doctor could not explain the cause of his death and, therefore, "deduced" it was caused by conditions arising out of his employment; (2) The plaintiff had been furnished with respirators to use in his work; (3) It was also said the plaintiff assumed the risk, and the court further said (4), "Occupational diseases are a part of the hazards of the industry." The foregoing observations so fully distinguish this case as to make further comment unnecessary.

Allen v. *Shell Petroleum Corp.*, 146 Kan. 67, 68 P. 2d 651 was also an action based upon common law negligence for damages because of a disease or disability acquired while employed in and about a distillery. The action was apparently based upon disability of plaintiff caused (p. 655) "by vapors, gases, or fumes." But his doctor "thought

this man's coming in contact with a hard flinty material is what caused the trouble." The plaintiff was unable to produce any medical authority that contact with the gases or fumes in question would produce plaintiff's condition. Plaintiff's doctor testified (p. 651) "he knew of no medical authority which supported the theory that plaintiff could have gotten such a disease at a refinery." In addition, the plaintiff was furnished with masks and instructed (p. 654) "concerning their availability and uses." The reasoning in this case is based upon the decision in the *Grammer* case cited and discussed above.

Spence v. *Bath Iron Works Corp.*, 140 Me. 287, 37 A. 2d 174 does not sustain defendant's contention. In that case the plaintiff was engaged in stripping armor and insulation from cables built to specifications of the U. S. Government for construction of naval craft. In the stripping process a material known as "halowax" flaked off in considerable quantities. This wax apparently caused a form of acne. It is apparent that defendant had no knowledge of this occupational hazard, since the material used was built to specifications of the U. S. Government.

The defendant on page 25 of its petition also cites *Bennett* v. *Pilot Products Co.*, (Utah) 235 P. 2d 525, 26 A.L.R. 2d 958, and *Stanton* v. *Sears, Roebuck & Co.*, 312 Ill. App. 491, having to do with the question of the liability of the employer, where the employee is allergic or has unusual susceptibility to injury from a particular product used by the employer.

This is contrary to defendant's contention in the trial court, *i.e.*, that plaintiffs developed dermatitis because each of them were particularly susceptible to, or likely to develop dermatitis from contact with diesel fuel oils, lubricating oils and sodium bichromates. Its contentions

were quite the opposite. Defendant's counsel in his opening statement to the jury said, in part, (Add'l. Abst. 2):

> "The evidence will show these men (referring to plaintiffs) were treated by the doctors to whom the railroad company sent them as the problem became more acute, as it became apparent that this was not a matter of an allergy or individual susceptibility of these men who first broke down with it;" (Emphasis supplied).

Another case cited by the defendant to sustain this contention is likewise not a F. E. L. A. case. *Pinkley* v. *C. & E. I. R. R. Co.*, 246 Ill. 370, was a common law action for injuries sustained by one of its employees when he was poisoned from handling creosoted timbers. The court held that the plaintiff knew the danger of handling creosoted timbers (p. 378), and the defendant was under no duty to warn him of such danger. The court saying, that the fact the appellee (plaintiff) received more injuries than he anticipated, and resulted in a disease of a permanent character did not render the defendant liable.

(c)

The medical reports of defendant's local surgeon to its chief surgeon were competent evidence to show notice.

The Appellate Court also correctly rejected defendant's contention that the reports of its own "local surgeon" —Dr. Meadows, to defendant's chief surgeon, Dr. R. J. Bennett, were "hearsay" and for that reason incompetent. In this respect, the Appellate Court said, (pet. p. 49):

> "Defendant argues that the court erred in admitting the medical reports made out by Dr. Meadows and transmitted to Dr. Bennett because they are hearsay and therefore incompetent and inadmissible. These reports were offered to prove that the defendant knew, through its own doctors, that diesel

fuel oil caused the dermatitis with which plaintiffs were afflicted. These reports were properly received in evidence as admissions against interest."

The Appellate correctly decided these questions against the defendant.

The evidence to which defendant's objections were leveled were plaintiff's Ex. No. 5, (Abst. 34); plaintiff's Ex. No. 6, (Abst. 36) and plaintiff's Ex. No. 7, (Abst. 37), being the reports submitted by Dr. Meadows to Dr. Bennett on each of the plaintiffs.

The evidence shows these reports were reports made by Dr. Meadows in the regular course of the business of the defendant, to its chief surgeon, Dr. R. J. Bennett. These reports were offered to prove that the defendant knew, through its own doctors that diesel fuel oil caused the dermatitis with which plaintiffs were afflicted. They were offered as admissions against interest (Abst. 34). The defendant, as we stated above, objected to their admission because it said these documents were incompetent because they were "hearsay" evidence. (Abst. 34). There was no legal merit to this contention.

Throughout the trial the defendant contended, and as it here contends, it had no knowledge or notice that diesel fuel or lubricating oils were harmful to its employees. The reports in question show in each instance, according to the findings of defendant's own doctors, that each of the plaintiffs had contracted dermatitis from contact with diesel fuel oil. The defendant's objections that these documents were "hearsay" was without merit. Since they were offered as admissions against interest, they were not subject to the objections on this ground. (*Schikora v. Freeport Motor Casualty Co.*, 320 Ill. App. 359, 51 NE. 2d 75). These reports were admissible for the purpose

offered. (*Beringer* v. *Lackner*, 331 Ill. App. 591; *Peterson* v. *Midwest Transfer Co.*, 344 Ill. App. 167).

The cases cited by the defendant in its petition (p. 21), to sustain its contention do not reach the question. In *Oard* v. *Dolan*, 320 Ill. 371, 378, a physician's report attached to a petition to have a person declared insane was rejected as incompetent as original evidence to prove insanity. In *Lewandowski* v. *Zuzak*, 305 Ill. 612, 614, the court held that report of physicians appointed by court who found in such report that the decedent was insane, was properly excluded for the same reason. And *Beringer* v. *Lackner*, 331 Ill App. 591 does not decide any material question.

We submit that the Appellate Court did not err in holding that the evidence created factual issues submissible to a jury on the question of whether the defendant in the exercise of reasonable care should have anticipated the injurious effects of constant contact with diesel fuel oils, lubricating oils and chromate solutions.

We suggest on the evidence, the verdicts as entered after remittiturs were most modest; that the defendant has no just cause to complain, or any legal grounds to seek certiorari in this Court.

CONCLUSION.

Your respondents (the plaintiffs), therefore respectfully suggest that the decisions of the Appellate and Supreme Courts correctly disposed of the issues before them; that petitioner's petition for certiorari to review the decision of the Appellate Court of the First District of Illinois, should be denied.

Respectfully submitted,

EZRA L. D'ISA,
1 No. La Salle Street,
Chicago 2, Illinois,
Attorney for Respondents.

MARION J. HANNIGAN,
LOUIS Z. GRANT,
EDWARD WOLFE,
Of Counsel.

CERTIORARI

DENIED